Supreme Court, U.S.
FILED
SEP 18 1998
OFFICE OF THE CLERK

No. 98-303

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DONALD A. BARNETT, SHEILA GOLD, RONDA CHANEY, LON CHANEY, JR., WILLIAM MITCHELL AND ROBERT Q. BUICKEROOD,

Petitioners,

vs.

GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH AND ANTHONY BLUMBERG,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal for the First Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION AND ROBERT BATINOVICH

Melvin R. Goldman*
Darryl P. Rains
Craig D. Martin
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-7000

Counsel for Respondents Glenborough Realty Corporation, Glenborough Corporation, and Robert Bationovich

Counsel of Record

105 pp

LIST OF PARTIES

The petition accurately lists the parties to the proceeding. Neither Glenborough Corporation nor Glenborough Realty Corporation have parents or nonwholly owned subsidiaries.

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iv
STATEMENT OF THE CASE		1
A.	Formation Of The REIT	2
B.	Allocation Of REIT Shares	3
C.	The Allegations Of Plaintiff's Complaint	3
D.	Settlement Of The Action	4
E.	Certification Of The Settlement Class	6
F.	The Trial Court's Approval Of The Settlement	6
G.	Solicitation Of Approval By The Limited Partners	7
H.	Appellate Review Of The Settlement	8
REASONS FOR DENYING THE WRIT		11
A.	The Mandatory Class Was Certified Under The Same, Uncontroversial Standards Approved By The Federal Courts	12
	1. This Court's holding in *Phillips Petroleum Co. v. Shutts*	12
	2. Federal Rule of Civil Procedure 23	13
	3. The Ninth Circuit has not exceeded the limited holding of *Shutts*	15
	4. California courts follow Rule 23 and *Shutts*	19
B.	The Class Was Properly Certified Pursuant To Rules 23(b)(1) And 23(b)(2)	20
	1. Defendants faced a high risk of inconsistent adjudications	21
	2. Plaintiffs' claims were predominantly equitable	22
C.	All Class Members Had Minimum Contacts With California By Virtue Of Their Ownership Of Interests In California Limited Partnerships	26

TABLE OF CONTENTS
(continued)

D. Petitioners Do Not Have Standing To Complain About The Mandatory Class Since They Are Not Aggrieved Parties 28
CONCLUSION 29

TABLE OF AUTHORITIES

CASES	PAGE(S)
Adams v. Robertson, 520 U.S. 83 (1997)	20 n.9
Allison v. Citgo Petroleum Corp., No. 96-30489, 1998 U.S. App. LEXIS 20171 (5th Cir. Aug. 18, 1998)	14
Arkansas Educ. Assn v. Board of Educ., Portland, Ark. Sch. Dist., 446 F.2d 763 (8th Cir. 1971)	24
Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994)	17, 18
Avagliano v. Sumitomo Shoji Am., Inc., 107 F.R.D. 748 (S.D.N.Y. 1985)	13
Bailey v. Patterson, 369 U.S. 30 (1962)	28
Bell v. American Title Ins. Co., 226 Cal. App. 3d 1589 (1991)	*passim*
Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed, 511 U.S. 117 (1994)	*passim*
City of San Jose v. Superior Court, 12 Cal. 3d 447 (1974)	8 n.3
Clarke v. Advanced Private Networks, Inc., 173 F.R.D. 521 (D. Nev. 1997)	19 n.8
DeBoer v. Mellon Mortgage Co., 64 F.3d 1171 (8th Cir. 1995), *cert. denied, Crehan v. DeBoer*, 517 U.S. 1156 (1996)	28
Epstein v. MCA, Inc., 126 F.3d 1235 (9th Cir. 1997)	27

TABLE OF AUTHORITIES
(continued)

CASES	PAGE(S)
Frazier v. City of Richmond, 184 Cal. App. 3d 1491 (1986)	20, 22, 23
Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976)	15
Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), *cert. denied*, 513 U.S. 986 (1994)	26, 27
Hanna v. Plumer, 380 U.S. 460 (1965)	13
Howard v. McLucas, 782 F.2d 956 (11th Cir. 1986)	13
Hynson v. Drummond Coal Co., 601 A.2d 570 (Del. Ch. 1991)	27
In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703 (E.D. Mich. 1985)	13
In re Real Estate Title and Settlement Servs. Antitrust Litig., 1986-1 Trade Cas. (CCH) (E.D. Pa. 1986), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988)	15
In re Real Estate Title and Settlement Servs. Antitrust Litig., 869 F.2d 760 (3d Cir. 1989)	15, 16, 28 n.14

TABLE OF AUTHORITIES
(continued)

CASES	PAGE(S)
Linney v. Cellular Alaska Partnership, Nos. 97-16637-40, 1998 U.S. App. LEXIS 20484 (9th Cir. Aug. 21, 1998)	*passim*
O'Shea v. Littleton, 414 U.S. 488 (1974)	28
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	*passim*
Probe v. State Teachers Retirement Sys., 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986)	14, 15, 22
Rodgers v. U.S. Steel Corp., 69 F.R.D. 382 (W.D. Pa. 1975)	24
Scott v. City of Anniston, Ala., 682 F.2d 1353 (11th Cir. 1982)	24
Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), *cert. petition filed* (Aug. 24, 1998)	14
Ticor Title Ins. v. Brown, 511 U.S. 117 (1994)	17 n.7
White v. National Football League, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995)	17, 28 n.14

TABLE OF AUTHORITIES
(continued)

STATUTES AND RULES

Cal. Civ. Proc. Code
§382 6
§527 8
Fed. R. Civ. P.
Rule 23(b)(1) . . . . . *passim*
Rule 23(b)(2) . . . . . *passim*
Rule 23(b)(3) 13
Rule 23(c)(2) 13

OTHER AUTHORITIES

Proposed Rules of Civil Procedure, Advisory Committees Notes,
39 F.R.D. 69 (1966) 13, 14

1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §1.22 (3d ed. 1992) 13, 14

7A Charles Alan Wright et al., *Federal Practice & Procedure: Civil* §1775 (2d ed. 1986) 21, 24

STATEMENT OF THE CASE

Substantial evidence supports the conclusions of the courts below that, in an action to prevent the consolidation of eight faltering limited partnerships, claims for equitable relief predominated and defendants faced a risk of adjudications imposing upon them incompatible standards of conduct.

Based on these determinations, the California Court of Appeal held that a settlement class was properly certified under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), and that the mandatory settlement did not run afoul of the due process protections set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The California Court of Appeal's analysis is in harmony with that of every Circuit Court of Appeals—including the Ninth Circuit—to have addressed mandatory certification since this Court decided *Shutts*. *See, e.g., Linney v. Cellular Alaska Partnership*, Nos. 97-16637-40, 1998 U.S. App. LEXIS 20484 (9th Cir. Aug. 21, 1998) (mandatory class certification appropriate where claims not "wholly or predominantly" for monetary damages). The petition, therefore, does not present a "conflict" in need of resolution by this Court. Rather, at issue is whether a trial judge abused his discretion in concluding that the plaintiff class was "of the type historically allowed under the terms of Rules 23(b)(1) and 23(b)(2)." Pet. 21.

The record below demonstrates that this action was properly certified as a no opt out class under both Rules 23(b)(1) and 23(b)(2), and that plaintiffs' claims for damages were, at most, incidental to their primary objective of altering the terms of the consolidation.

Moreover, the opt out right addressed by *Shutts* is implicated only where a state court otherwise lacks personal jurisdiction over plaintiff class members. Under *Shutts*, class members' minimum contacts obviate any need for an opt out right. Because the limited partnerships in which class members

held interests were organized under California law, plaintiffs had contacts with the State of California sufficient to establish the trial court's jurisdiction for purposes of the settlement.

Finally, by litigating the merits of the settlement in a California court, petitioners have waived any argument that the trial court's exercise of personal jurisdiction over them deprived them of due process. The petition should, therefore, be denied.

A. Formation Of The REIT.

The plaintiff class in this case consists of the former limited partners of eight partnerships, formed between 1979 and 1988. The purpose of the partnerships was to invest in real estate, hold it for periods of between three and fifteen years, and distribute anticipated returns. App. 2.

At the time of the proposed consolidation, only two of the eight partnerships had returned their limited partners' original investment. Units of the limited partnership were traded sporadically in the secondary market, and at a deep discount to their original cost and net asset value. *Id.*

Glenborough Corporation and Robert Batinovich,[1] who had assumed management of the partnerships during the period 1989-1991, sought to remedy investors' poor return and lack of liquidity. In September 1994, Glenborough proposed that the limited partnerships be merged with Glenborough Corporation into a publicly-traded real estate investment trust (the "REIT"), listed on the New York Stock Exchange.

The proposed consolidation offered limited partners a number of advantages over the partnerships' original structure. First, because REIT shares would be traded on a major exchange, the consolidation would provide investors with greater liquidity, which most investors consider beneficial. Second, the consolidation would allow limited partners to share

[1] Mr. Batinovich, Glenborough Corporation, and their affiliated entities are collectively referred to as "Glenborough."

in fees generated by Glenborough's management of various properties. Third, limited partners would enjoy a diversification of their assets, both with respect to the type of properties held and their geographic location. Fourth, the REIT would permit enhanced access to capital markets and greater opportunities for future growth and investment.

B. Allocation Of REIT Shares.

Glenborough filed a Form S-4 registration statement with the Securities and Exchange Commission ("SEC") describing how Glenborough Corporation and the limited partnerships would merge, and how shares in the newly-formed REIT would be distributed. Shares in the REIT were to be allocated between Glenborough and the limited partnerships as a group, according to their respective contributions to the REIT's cash flow. The registration statement referred to this as the Level I allocation. At Level II, the shares allocated in Level I to entities other than Glenborough Corporation were to be divided among the limited partnerships and the other contributors according to each asset's net asset value. At Level III, shares in the REIT were allocated between the general partners and the limited partners of each limited partnership, in accordance with the provisions of each partnership agreement. App. 3.

C. The Allegations Of Plaintiff's Complaint.

On February 21, 1995, plaintiff Anthony Blumberg filed a complaint challenging the fairness of the consolidation to the limited partners. Plaintiff alleged that the contribution of Glenborough Corporation, which plaintiff asserted was a worthless management company, did not warrant giving Glenborough a 20 percent interest in the REIT. Plaintiff also alleged that the consolidation would prevent the ultimate liquidation of the properties and that the consolidation had been contrived so that Glenborough could continue to earn property management fees. The consolidation, plaintiff asserted, constituted a breach of fiduciary duty. App. 3.

The complaint also alleged that "plaintiff and the members of the Class have sustained and will continue to sustain irreparable injury in the absence" of court action and that plaintiff lacked "an adequate remedy at law." Accordingly, the complaint prayed for a declaration "that the defendants have breached their legal duties to limited partners," and sought an order "enjoining Defendants from effectuating the Roll-Up." App. 21a. Ancillary to this relief, the complaint also prayed for rescission (if the consolidation were consummated before trial), an accounting, and for compensatory damages according to proof. *Id.*

D. Settlement Of The Action.

On April 6, 1995, the parties commenced discussions to explore the possibility of resolving the case. Glenborough agreed to provide plaintiff's counsel with non-public documents relating to, among other things, the proposed allocation of shares, including SEC comments on the registration statement. App. 3-4. Glenborough also promised not to attempt to "go effective" with the consolidation without providing plaintiff sufficient time to pursue formal discovery or seek an injunction, if necessary. App. 3-4.

One critical element of the settlement negotiations concerned Glenborough's transaction with Rancon Corporation ("Rancon"). Following the filing of the original registration statement with the SEC proposing the consolidation, Glenborough had entered with Rancon into a series of agreements granting an affiliate of Glenborough the right to provide partnership administration and property management services for nine real estate limited partnerships.

Given that the Level I allocation of REIT shares between Glenborough and the limited partnerships was based upon contributed cash flow, Glenborough argued to plaintiff's counsel that this significantly higher cash flow justified increasing Glenborough's Level I allocation of shares in the REIT from 20.2 percent to 29 percent. Glenborough said that it

would nevertheless leave its Level I allocation at the pre-Rancon level. App. 4. Plaintiff's counsel agreed to study the proposed revised terms of the transaction.

After consulting with an expert from Coopers & Lybrand, plaintiff's counsel concluded that the allocation of REIT shares between the limited partners and Glenborough approached the realm of reasonableness when compared to similar transactions. Counsel also reviewed the trading price and earnings multiples of similar REITs, as well as information concerning contributed debt, Glenborough's expenses and the fairness opinion of an outside consultant. Plaintiff's counsel satisfied themselves that, with the additional projected Rancon cash flow, the transaction's terms were reasonable. App. 4-5.

Plaintiff's counsel's investigation led them to conclude, however, that additional risk disclosures should be included in the Prospectus, and that further restrictions on the ability of management to issue and exercise stock options should be adopted. After negotiations concerning these terms, the parties reached an agreement in principle to settle the litigation on June 21, 1995. App. 5, 14-15.

The settlement called for, among other things, additional disclosures in the initial "Risk Factors" section concerning the lack of formal appraisal of Glenborough Corporation. It also required disclosures concerning anticipated management fees and the impact of the Rancon transaction. App. 15.

The settlement also imposed additional restrictions on management's stock sales. The "lock-up" on REIT shares owned by Glenborough management, preventing Glenborough from disposing of its stock, was extended from one year to two. The duration on the prohibition on the granting of stock options was also extended, and stock options with an exercise price of less than $15 per share were prohibited for one year. *Id.*

E. Certification Of The Settlement Class.

After an extensive process of documenting the agreement, the parties executed a final settlement agreement in October 1995. App. 5. Pursuant to that agreement, on October 11, 1995, the San Mateo Superior Court certified a settlement class of all limited partners in the limited partnerships under California Code of Civil Procedure Section 382 and Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2). App. 27-28. The court also gave preliminary approval to the settlement, and scheduled a settlement hearing for December 21, 1995. Notice was mailed to the limited partners on November 15, 1995. App. 29, 31.

Due to the nature of the relief for which the settlement provided—additional risk disclosures and structural modifications to the consolidation—and the necessarily fixed allocation of REIT shares, the settlement did not permit opt outs. Had class members been permitted to opt out, plaintiffs who excluded themselves from the terms of the settlement would nevertheless have enjoyed the benefits of the settlement.

F. The Trial Court's Approval Of The Settlement.

Fourteen class members, including the six objectors who filed this petition, submitted objections in response to the notice. In order to permit all objectors to file briefs and other materials, the court continued the hearing on the settlement from December 21, 1995 to January 17, 1996. After the January hearing, the court accepted additional briefing from petitioners and responses from plaintiff Blumberg and the Glenborough defendants. In total, these submissions exceeded 2800 pages. In addition, another group of objectors filed a separate action in federal court, seeking (without success) to have the consolidation enjoined.

On June 6, 1996, the trial court issued a written decision granting plaintiff's motion for final approval of the settlement. The trial court made the following findings, among others:

- that plaintiff's counsel "demonstrated in their support of their request for approval, that their approach of cash-flow valuation, rather than relative asset valuation, is economically more realistic and is the one that is generally adopted in similar situations;"
- that plaintiff and Glenborough "engaged in negotiations, and certain modifications were made . . . requiring additional disclosures and imposing certain restrictions on the sale of the general partner's stock . . . and also imposing certain restrictions on management incentive options, and the exercise of such options;"
- that the court had "consider[ed] the benefits conferred on the settling class members by the settlement, and the risks faced by the settlement class members of establishing liability, causation and damages, and the likely probable duration and further expense of the likely burdensome and protracted litigation in the absence of settlement;"
- that the settlement "was entered in good faith;" and that "the settlement is fundamentally fair, adequate and reasonable to the respective parties to the settlement."

App. 49-52.

G. Solicitation Of Approval By The Limited Partners.

While the settlement approval process continued, a final Prospectus detailing the proposed consolidation was issued to the partnerships' limited partners on October 26, 1995. The Prospectus set a deadline of December 28, 1995 for voting on the transaction, one week after the scheduled settlement hearing. Eighty percent of limited partners who cast proxies voted to approve the consolidation. App. 6. Because the trial court continued the settlement hearing to permit additional briefing, the vote occurred and the transaction closed before the settlement received final approval.

H. Appellate Review Of The Settlement.

Petitioners appealed the trial court's decision to the California Court of Appeal, arguing that, for many fact-specific reasons, the settlement was unfair. Petitioners said that plaintiff's case had been strong on the merits, and that the Level I and Level II allocations of REIT stock unfairly benefited Glenborough. Petitioners also asserted that the settlement had not conferred a meaningful benefit on the class and that the trial court order certifying the settlement class and preliminarily approving the settlement had violated the trial court's local rules and California Code of Civil Procedure section 527.[2] Petitioners also argued that the mandatory settlement class had been improperly certified pursuant to Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2) and that the settlement violated due process.[3]

The Court of Appeal rejected petitioners' arguments and affirmed the settlement. With respect to the mandatory settlement class, the court found that certification pursuant to Federal Rule of Civil Procedure 23(b)(1)[4] had been appropriate because "there was a likelihood of separate actions" and a "risk of inconsistent adjudications which could create potential conflicts for Glenborough, e.g., concerning required disclosures

---

[2] The order preliminarily approving the settlement enjoined class members from filing other suits. Petitioners argued that to obtain such relief, the California Code requires parties to post a bond.

[3] Although California courts are not bound by Rule 23, the California Supreme Court "has directed state courts to follow rule 23 whenever California authority is lacking." App. at 21 (citing *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 453 (1974)).

[4] Rule 23(b)(1) applies where "the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying, adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . ."

in the prospectus which would have to be disseminated class-wide, allocation of REIT shares, etc." App. 21.

The Court of Appeal concluded that certification was equally appropriate under Rule 23(b)(2),[5] affirming the trial court's implicit finding that the action was primarily for equitable relief:

> The complaint itself sought to enjoin consummation of the rollup, or, if the rollup closed, to rescind it absent a fair market evaluation of [Glenborough's] assets. It further asked for an accounting and for compensatory damages. The settlement itself provided for non-monetary relief. Of course damage claims were extinguished, but so, too was the right to hold up the rollup! The court did not abuse its broad discretion in implicitly deciding that equitable relief predominated.

App. 22.

The Court of Appeals also rejected each of the theories petitioners asserted would have entitled the class to substantial monetary relief. For example, petitioners had claimed that the Level I allocation was unfair to the limited partners because it was based upon contributed cash flow rather than a fair market valuation of the entities' assets. The Court of Appeal observed that petitioners had "disregarded" the parties' expert and other evidence showing that the valuation methods were commonly used in such consolidations. Moreover, the court noted, Glenborough Corporation's contributed cash flow had been heavily discounted because Glenborough "received 20.2 percent of the shares issued by the REIT while contributing 29.5 percent of the cash flow contributed to the REIT." App. 8.

---

[5] Class certification pursuant to Rule 23(b)(2) is proper where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

Petitioners had also complained that Glenborough Corporation's value had been overstated, and that the Rancon transaction would not benefit limited partners. The Court of Appeal disposed of this argument as well, noting that petitioners' objection "ignores [Glenborough Corporation's] cash flow contribution" and the fact that Glenborough "contributed substantial intangible assets to the REIT in the form of revenue streams from long-term management contracts." App. 9.

Petitioners had also argued that the Level II allocation was unfair, claiming that one of the partnerships owned substantially by Glenborough received a disproportionate interest in the REIT. The Court of Appeal again rejected petitioners' argument, showing that shares allocated to the partnership accurately reflected its net asset value. App. 10-12.

Finally, petitioners had asserted that the consolidation would prevent the liquidation of the partnerships' property holdings according to their original timetable. The Court of Appeal, however, noted that because the consolidated entity would be traded on the New York Stock Exchange, the consolidation afforded investors liquidity, and that the consolidation allowed investors to share in property management fees. The court also stated that a bulk liquidation of the properties would have resulted in discounts exceeding the entire cost of the consolidation, and that the cost of administering the REITs during a gradual liquidation would have eroded the return to the limited partners. App. 12-13.

The Court of Appeal concluded that members of the plaintiff class had been afforded due process:

> [W]here the claim for monetary relief does not predominate over claims for injunctive and declaratory relief, due process is satisfied *without* the opt out right where objectors are adequately represented by named plaintiffs; represented by a qualified attorney; provided with notice of the proposed settlement; given an opportunity to object; and assured that settlement will not go forward unless the trial court determines it to be fair, adequate and reasonable. *All these elements ensuring due process were present in this case.*

App. 23-24 (emphasis added) (citation omitted).

Petitioners sought review of the this decision by the California Supreme Court on March 30, 1998. The petition for review was denied on May 20, 1998.

REASONS FOR DENYING THE WRIT

The petition should be denied for at least four reasons. First, California and federal courts apply the same rule — that no opt out classes may properly be certified where monetary claims do not predominate or there is a risk of inconsistent judgments. There is no conflict between California and federal law. Second, substantial evidence supports certification of a no opt out class under these well-settled standards. Third, the settlement did not deprive class members of due process because they had minimum contacts with California sufficient for the California court to exercise *in personam* jurisdiction. This obviates the need for the additional procedural protection of a right to opt out. Finally, by litigating the merits of the settlement in the California trial court, petitioners waived any argument that California's exercise of jurisdiction deprived them of due process.

A. The Mandatory Class Was Certified Under The Same, Uncontroversial Standards Approved By The Federal Courts.

Where an action seeks a "wholly or predominantly money judgment," federal courts follow the teaching of *Shutts* and afford absent class members a right to opt out. Petitioners' suggestion, that the Ninth Circuit articulated a different standard in its decision *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), has been rejected by the lower courts and, most recently, by the Ninth Circuit itself. California courts, including the courts below, also follow *Shutts*, requiring a right of exclusion where claims are predominantly monetary. *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1610 (1991). Where plaintiffs seek predominantly equitable relief, and certification is proper under Rules 23(b)(1) and 23(b)(2), California's courts hold that the right of exclusion lies within the sound discretion of the trial court. *Id.*

1. This Court's holding in *Phillips Petroleum Co. v. Shutts*.

In *Shutts*, the defendant argued that a class certified by the Kansas state court improperly purported to bind non-resident plaintiff class members. Because many of the absent plaintiff class members lacked "minimum contacts" with Kansas, the defendant argued, the court lacked personal jurisdiction over class members. The defendant asserted that the Kansas court had thus exceeded its jurisdictional reach, depriving absent class members of due process. *Shutts*, 472 U.S. at 806.

This Court rejected the defendant's jurisdictional challenge. It held that because the burdens of litigation upon absent plaintiff class members are fewer than those imposed upon absent defendants, the "Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." *Shutts*, 472 U.S. at 811. Thus, the Court held, states may exercise personal jurisdiction over absent class members in actions "concerning claims wholly or

predominately for money judgments," so long as class members receive notice and an opportunity to opt out. *Id.* at n.3.

Shutts does not reach the question of whether courts may constitutionally bind absent class members in actions not "wholly or predominately" seeking money damages without affording an opt out right.

2. Federal Rule of Civil Procedure 23.

The Federal Rules of Civil Procedure, however, which are presumptively constitutional, *Hanna v. Plumer*, 380 U.S. 460, 471 (1965), do speak to the circumstances under which mandatory classes may be certified. Since 1966, the Federal Rules have permitted no opt out classes where either (1) the defendant is subject to the risk of multiple, inconsistent adjudications or (2) the plaintiff seeks primarily equitable relief.[6] Rule 23(c)(2) requires that members of classes certified pursuant to Rule 23(b)(3) be allowed to exclude themselves; no such opt out right is afforded under Rules 23(b)(1) or 23(b)(2). *See Proposed Rules of Civil Procedure, Advisory Committee's Notes*, 39 F.R.D. 69, 100 (1966) (certification pursuant to (b)(1) provides "a ready and fair means of achieving unitary adjudication"); 105 (judgment in a class action under (b)(1) or (b)(2) binding on "class members"; in (b)(3), binding only upon those to whom notice was sent and who did not request exclusion); *Howard v. McLucas*, 782 F.2d 956, 961 (11th Cir. 1986); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 710-13 (E.D. Mich. 1985); *Avagliano v. Sumitomo Shoji Am., Inc.*, 107 F.R.D. 748, 749 (S.D.N.Y. 1985).

The reasons for permitting mandatory classes under Rules 23(b)(1) and 23(b)(2) are compelling, as Mr. Newberg points out:

> Because class actions under Rule 23(b)(1) or (2) are designed to avoid inconsistent adjudications or prejudice arising from separate suits by individuals

---

[6] Even petitioners do not claim that *Shutts* overruled Rule 23 *sub silentio*.

> similarly situated . . ., they are analogous to interpleader or quasi-in-rem suits in which equitable circumstances dictate the need for a unitary adjudication . . . . The societal cost of permitting opt-outs for the purpose of individual adjudications . . . could be enormous, compared to the modest gains at best in constitutional terms for additional individual procedural rights. Thus, the opt-out due process right for class members in common question [*i.e.*, Rule 23(b)(3)] class actions, which *Shutts* held is tantamount to implied consent to jurisdiction in the absence of exercising such exclusion right after notice, would also seem to be an unnecessary element of procedural due process in class suits that are traditionally maintained on a no-opt-out basis, regardless of individual consent of class members.

1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 1.22, at 1-51 (3d ed. 1992). *See also Advisory Committee's Notes, supra*, 39 F.R.D. at 100 ("The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class [in Rule 23(b)(1) actions] furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.").

Every Circuit Court of Appeals to have considered the question after *Shutts* has concluded that, so long as claims for monetary damages do not predominate, a class may be properly certified under Rules 23(b)(1) and 23(b)(2). *See, e.g., Allison v. Citgo Petroleum Corp.*, No. 96-30489, 1998 U.S. App. LEXIS 20171, at *17 (5th Cir. Aug. 18, 1998); *Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998), *petition for cert. filed* (August 24, 1998) (No. 98-326); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

3. The Ninth Circuit has not exceeded the limited holding of *Shutts*.

The petition contends that in *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994), the Ninth Circuit "held unequivocally" that where a class action purports to bind absent class members concerning claims for "substantial damages," due process is violated. Pet. 4. The petition states that the Ninth Circuit thus announced a new due process standard, beyond the explicit scope of *Shutts*. Pet. 18.

The petition misstates Ninth Circuit law. For years, unchallenged Ninth Circuit authority has provided that where an action is properly certified pursuant to Rules 23(b)(1) and 23(b)(2), a court may, in its sound discretion, preclude class members from exercising an opt out right. *See, e.g., Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th Cir. 1976).

Brown did not purport to overturn that precedent. In 1985, class action claims against several title insurance companies were filed in Pennsylvania. In 1986, a Pennsylvania district court certified a mandatory settlement class pursuant to Rules 23(b)(1) and 23(b)(2) after determining that the defendants faced the risk of inconsistent adjudications and that the relief sought was primarily equitable. *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149 at 62,928 (E.D. Pa. 1986), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

Thereafter, certain members of the settlement class filed an action in Arizona state court reasserting the released claims. That case was enjoined by the Arizona federal district court on the grounds that the action interfered with the prior federal judgment in Pennsylvania. The Third Circuit reversed. *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1989). Without reaching the question of whether

the plaintiffs had been denied adequate due process by the settlement, the Third Circuit held that, because the plaintiffs lacked minimum contacts with Pennsylvania, the Pennsylvania court could not enjoin the plaintiffs from collaterally attacking the judgment elsewhere. *In re Real Estate Title*, 869 F.2d at 765.

Specifically, the Third Circuit noted that while Congress has, in some instances, required plaintiffs to litigate their claims in particular fora, Congress never indicated that a plaintiff, lacking minimum contacts with the class action forum, which had "substantial damage claims should nonetheless be forced to bring its collateral challenge in that forum." 869 F.2d at 767. Because the Third Circuit concluded that the judgment in the Pennsylvania court had released "substantial damage claims" in which the plaintiffs had a property interest, and because the Pennsylvania court lacked personal jurisdiction over the Arizona plaintiffs, the plaintiffs were permitted to bring a collateral challenge to the settlement in Arizona. *In re Real Estate Title*, 869 F.2d at 767-68.

The plaintiffs in *Brown*, other settlement class members, filed suit in the Arizona federal district court. The court held that the plaintiffs' claims were barred by *res judicata*. The plaintiffs appealed to the Ninth Circuit. *Brown*, 982 F.2d at 389-90.

In its decision reversing the district court, the Ninth Circuit did not address whether it believed itself bound by the Pennsylvania district court's 1986 determination that the claims in the prior litigation were primarily equitable. Instead, the Ninth Circuit stated only that it would follow the Third Circuit's "holding" that the Pennsylvania judgment foreclosed "substantial damage claims." Relying on *Shutts*, the court observed that where monetary claims predominate, a right of exclusion must be granted. Because the Pennsylvania settlement class had been mandatory, the Ninth Circuit concluded that due process had been violated. *Brown*, 982 F.2d at 392.

Petitioners argue that by referring to "substantial" rather than "predominant" damage claims, the Ninth Circuit lowered the threshold at which due process requires a right of exclusion. But the Ninth Circuit did not distinguish between "substantial" claims and "predominant" claims, or indicate that it was exceeding this Court's holding in *Shutts*. To the contrary, the Ninth Circuit explicitly recognized that "*Shutts* is limited to claims 'wholly or predominantly for money judgments.' " *Brown*, 982 F.2d at 392 (quoting *Shutts*, 472 U.S. at 811 n.3).

Subsequent decisions confirm that, although *Brown*'s language is "a little broad and imprecise," *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 463-64 (N.D. Cal. 1994), the Ninth Circuit did not intend to contradict its own precedent or exceed the limited holding of *Shutts*.[7]

In one of the first lower court decisions to consider *Brown*, *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), for example, the district court certified a mandatory settlement class. Reviewing the implications of the *Brown* decision, it concluded:

> The *Brown* case does not alter the constitutional standards articulated in *Shutts* and, in fact, expressly recognizes that "*Shutts* is limited to claims 'wholly or predominantly for money judgments.' " At most, Brown stands for the proposition that where a class action involves claims "wholly or predominantly" for

---

[7] It was the Ninth Circuit's imprecision that led this Court to grant certiorari in *Brown*, later dismissed as improvidently granted. *See Ticor Title Ins. v. Brown*, 511 U.S. 117, 125 (1994) (O'Connor, J. dissenting) ("[A]lthough we held in [*Shutts*] that there is a constitutional right to opt out of class actions brought in state court, that holding was expressly 'limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgment . . .' The Ninth Circuit's rule, by contrast, applies whenever 'substantial damage claims' are asserted.") (citations omitted). As discussed below, that perceived conflict was recently clarified by the Ninth Circuit.

> money damages, and where the settlement of such class action accords only injunctive relief and no damage recovery, an absent nonresident class member's later claim for damages will not be barred.

822 F. Supp. at 1412 (emphasis in original).

Similarly, in *Arnold*, the district court acknowledged that while the language of *Brown* was muddled, the Ninth Circuit's exclusive reliance on *Shutts* made it clear that "under *Ticor* and *Shutts*, the constitutional due process requirement of notice to absent class members applies only to cases where claims for monetary damages 'predominate.'" *Arnold*, 158 F.R.D. at 464 (emphasis in original).

Most importantly, the Ninth Circuit itself has clarified its holding in *Brown*. Three days after this petition was filed, the Ninth Circuit held that "due process requires the option to opt-out only in the limited set of claims that are 'wholly or predominately for money judgments.'" *Linney v. Cellular Alaska Partnership*, Nos. 97-16637-40, 1998 U.S. App. LEXIS 20484, at *13 (9th Cir. Aug. 21, 1998) (quoting *Shutts*, 472 U.S. at 811 n.3).

In *Linney*, limited partners sued their general partner for breach of contract and breach of fiduciary duty. After one proposed settlement was rejected by the district court as inadequate, the parties reached a proposed settlement providing for equitable relief and a settlement fund.

Objectors challenged the settlement, arguing that the class had been inadequately represented. They asserted that the mandatory nature of the settlement deprived the class of due process because class members could not avoid releasing their damage claims. *Linney*, 1998 U.S. App. LEXIS 20484, at *12.

Explicitly relying on its decision in *Brown*, the Ninth Circuit rejected this argument:

> [A]ppellants argue that new class counsel erred by not insisting that the class be allowed to opt-out of the

> monetary portion of the settlement, citing cases to suggest that the option to opt-out is required where monetary relief is sought in addition to injunctive relief. *However, this court has held that due process requires the option to opt-out only in the limited set of claims that are "wholly or predominately for money judgments."*

Id. at *12-13 (emphasis added) (citations omitted). The court then reaffirmed the viability of longstanding Ninth Circuit precedent holding that denial of a right of exclusion in cases certified pursuant to Rule 23(b)(2) lies within the sound discretion of the trial court. *Id.* at *13 n.3, 20 n.6.

There is, therefore, no decision adopting the due process test petitioners propose here, that the presence of "substantial" damages precludes certification of a mandatory class.[8]

4. California courts follow Rule 23 and *Shutts*.

Rule 23(b) and this Court's holding in *Shutts* are precisely the standards applied by California courts in determining whether to certify a class action and whether due process requires the right of absent class members to opt out. Where claims are predominantly for money damages, California courts permit class members a right of exclusion. A right to exclusion is discretionary where the class is certified pursuant to Rules 23(b)(1) and 23(b)(2). *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1603 (1991).

In *Bell*, objectors to a settlement argued that the trial court's preclusion of opt outs had deprived them of due

---

[8] *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521 (D. Nev. 1997) does not adopt the "substantial damages" test posited by petitioners. In *Clarke*, the district court denied a motion for mandatory class certification. Citing *Brown*, the court found an opt out right was required because "[w]hile the complaint incidentally seeks to enjoin interference with partnership management, diversion of partnership assets, and a turn-over order, *damages quite plainly is the primary relief sought.*" *Id.* at 523 (emphasis added). This holding is entirely consistent with *Shutts* and *Linney*.

process. The Court of Appeal concluded that, under *Shutts*, absent class members must receive the right to "opt out" of class actions seeking to bind plaintiffs "concerning claims wholly or predominantly for money judgments." *Bell*, 226 Cal. App. 3d at 1609 (quoting *Shutts*, 472 U.S. at 811 n.3). The *Bell* court held, however, that the trial court had not abused its discretion in precluding opt outs because the settlement class had been certified under Rules 23(b)(1) and 23(b)(2), the action was not predominately for monetary relief, and the plaintiff class consisted of owners of California real property, thereby satisfying the minimum contacts test for personal jurisdiction. *Id.*, 226 Cal. App. 3d at 1609-11.

California's interpretation of Rule 23 and *Shutts* is thus consistent with every post-*Shutts* Court of Appeals decision addressing mandatory classes. Because the conflict between California and federal law suggested by petitioners does not exist, the petition should be denied.

B. The Class Was Properly Certified Pursuant To Rules 23(b)(1) And 23(b)(2).

The petition seeks review, then, not of a legal conflict, but of the fact-intensive question of whether the trial court abused its discretion in finding the settlement class to be "of the type historically allowed under the terms of Rules 23(b)(1) and 23(b)(2)." Pet. 21.

California's trial courts are afforded wide discretion in determining whether and how a class is certified. *See Bell*, 226 Cal. App. 3d at 1603 ("The trial court has great discretion in decisions on certifying class actions."); *Frazier v. City of Richmond*, 184 Cal. App. 3d 1491, 1503 (1986) (trial court's decision concerning whether to provide opt out "should not be upset on appeal in the absence of an abuse of the trial court's discretion"). Here, the record confirms the conclusions of the courts below that this mandatory class was properly certified pursuant to Rules 23(b)(1) and 23(b)(2), and that class members were afforded due process.

1. Defendants faced a high risk of inconsistent adjudications.

Rule 23(b)(1) provides that certification is appropriate where "the prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." In order to certify a class pursuant to subsection (b)(1), there "must be a risk that separate actions will in fact be brought if a class action is not permitted." 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1773, p. 427 (2d ed. 1986).

In this case, the risk of multiple inconsistent adjudications was significant. Shortly after the trial court granted preliminary approval of the settlement, a separate federal action was filed seeking to enjoin the consolidation. App. 21. Petitioners, moreover, made it very clear that they would pursue separate litigation if allowed to do so.

Had multiple actions been permitted to proceed, they could have resulted in irreconcilable rulings governing Glenborough's conduct with respect to the consolidation. For example, had one court found the merger beneficial, and instructed Glenborough to complete the consolidation as required by the limited partners' proxy vote, while another found the merger to violate the general partners' fiduciary duties and ordered it abandoned, Glenborough would have been confronted with mutually exclusive orders.

Similarly, different courts could have mandated varying allocations of REIT shares among the various entities contributing assets. If in one case, a court determined that the increased cash flow contributed by the Rancon transaction justified an allocation of 29 percent of the REIT shares to Glenborough, while another court determined that the 20 percent allotted Glenborough was fair, and still another concluded Glenborough should receive only 10 percent, the consolidation

would have been unworkable. Or, had courts come to differing conclusions concerning the adequacy of disclosures in the Prospectus, Glenborough would have faced the impossible task of producing distinct versions of a document that must, as a matter of law, be distributed class-wide. App. 21.

As a result, the trial court concluded there was a risk of multiple inconsistent adjudications and certified the class pursuant to Rule 23(b)(1). The Court of Appeal agreed, finding that the record reflected "a likelihood of separate actions" and thus "a risk of inconsistent adjudications." App 21.

In arguing that certification under Rule 23(b)(1) was "insupportable," petitioners ignore each of these points. Rather, petitioners assert that "the mere fact that some plaintiffs might be successful in individual lawsuits against a defendant while others may not is not a ground for invoking Rule 23(b)(1)(A)." Pet. 22. Neither the parties, the trial court nor the Court of Appeal, however, ever relied upon such a theory in support of class certification.

2. Plaintiffs' claims were predominantly equitable.

Certification of a mandatory class is also appropriate where the relief sought is predominantly equitable in nature. Rule 23(b)(2) provides for class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Federal courts, including the Ninth Circuit, hold that "[c]lass actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages." *Linney*, 1998 U.S. App. LEXIS 20484, at *13 (quoting *Probe*, 780 F.2d at 780).

Like the federal courts, "California courts have . . . afforded rule 23(b)(2) status where the final relief sought includes both injunctive relief and monetary damages." *Bell*, 226 Cal. App. 3d at 1606 (citing *Frazier*, 184 Cal. App. 3d at

1501 (certifying pursuant to (b)(2) where case not predominantly for monetary damages)). Thus, in determining whether to certify a class pursuant to subsection (b)(2) in a case seeking monetary and non-monetary relief, California's courts look to whether the requested monetary relief predominates. *Bell*, 226 Cal. App. 3d at 1606.

In this case, plaintiffs sought predominantly equitable relief.[9] The complaint sought to enjoin the consolidation (or asked for rescission if the consolidation closed) unless there was a fair and independent valuation of the assets contributed by Glenborough. As plaintiff Blumberg's counsel declared under penalty of perjury:

> When we filed suit, our primary orientation was to challenge the . . . allocations (i.e., maximizing the shares allocable to the partnerships), [to] supplement the risk disclosures of the transaction to the limited partners, and to achieve as much protection as possible for the post-rollup market value of the shares received.

App. 24a-25a.

Indeed, it was the predominance of claims for equitable relief that initially formed the basis of petitioners' opposition to the settlement's release of damage claims. In their brief, petitioners told the trial court that the "focus of the original Complaint was for injunctive relief — *i.e.*, to prevent the Consolidation. . . ." App. 35a. Petitioners also represented that "injunctive relief would end this litigation in days." App. 66a.

---

[9] This case is, therefore, distinguishable from *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028 (1997), in which the Court granted, and later dismissed, certiorari. That case concerned allegations that an insurance company had encouraged insureds to exchange existing policies for more expensive ones providing less coverage, claims best addressed through monetary damages. As the petitioners told the Court, unlike this case, *Adams* "primarily involv[ed] claims for monetary relief." *Adams*, 520 U.S. at , 117 S. Ct. at 1029.

Petitioners can hardly blame the trial court for agreeing that the action sought primarily injunctive relief.

Petitioners also assert that because, by the time the settlement had finally been approved, the consolidation had occurred and the disclosures and limitation on trading of the shares were in place, defendants' actions had rendered "moot" the equitable relief originally sought.[10] Without citation to authority, petitioners assert that, as a result, the equitable claims were no longer "predominant," rendering Rule 23(b)(2) certification inappropriate. Pet. 24.

Courts and commentators agree, however, that actions taken by a defendant after a lawsuit is filed cannot change the nature of the plaintiff's claims, nor will such action defeat class certification. *See Scott v. City of Anniston, Ala.*, 682 F.2d 1353, 1358 (11th Cir. 1982) ("[A] class action properly brought under Rule 23(b)(2) need not be reclassified under (b)(3) merely because a change in the defendant's conduct made injunctive relief inappropriate."); *Arkansas Educ. Ass'n v. Board of Educ., Portland, Ark., Sch. Dist.*, 446 F.2d 763 (8th Cir. 1971); *Rodgers v. U.S. Steel Corp.*, 69 F.R.D. 382 (W.D. Pa. 1975); 7A Wright, *Federal Practice & Procedure* § 1775 at 467-68.

Nor do petitioners' characterization of the money damages at stake, unsupported by the record, alter the nature of the litigation. Petitioners assert that claims "with an estimated value of between $10 and $20 million" were released. Pet. 3. In fact, the record shows plaintiffs' damage claims were completely meritless. Indeed, in analyzing the fairness of the settlement, the Court of Appeal considered and refuted each argument mustered by petitioners in support of their alleged damages. App. 7-14. Petitioners do not even attempt to rebut the Court of Appeal's conclusions.

---

[10] The consolidation was consummated before the settlement was finally approved only because of the delay caused by petitioners' challenge to the settlement. Moreover, as the Court of Appeal noted, the consolidation had not occurred at the time the class was certified. App. 21 n.6.

After a thorough review of the record, the Court of Appeal held that the trial court had acted within its sound discretion in determining plaintiffs' claims for equitable relief predominated and in certifying the class pursuant to Rule 23(b)(2):

> The complaint itself sought to enjoin consummation of the rollup, or, if the rollup closed, to rescind it absent a fair market evaluation of [Glenborough's] assets. It further asked for an accounting and for compensatory damages. The settlement itself provided for non-monetary relief. Of course damage claims were extinguished, but so, too was the right to hold up the rollup! The court did not abuse its broad discretion in implicitly deciding that equitable relief predominated.

App. 22.[11] The petition offers no basis to disturb this conclusion.

---

[11] Without citation to the record, petitioners claim that the Court of Appeal "focuse[d] unduly on the consideration *received* in the settlement . . . rather than on the claims released in the settlement." Pet. 18 (emphasis in original). To the contrary, as the opinion makes clear, the court considered both the nature of the relief sought and the relief obtained. App. 22. Moreover, as the Ninth Circuit's decision in *Linney* shows, courts may properly weigh the relief afforded by a settlement in determining the nature of the claims. *Linney*, 1998 U.S. App. LEXIS 20484, at *13 (comparing monetary value of settlement's equitable consideration with value of settlement fund).

C. All Class Members Had Minimum Contacts With California By Virtue Of Their Ownership Of Interests In California Limited Partnerships.

As discussed above, *Shutts* held that in a class action primarily for money damages, an out-of-state class member is not bound unless the forum state provides procedural due process protections. Those protections include providing absent class members with the opportunity to opt out or remove themselves from the class. *Shutts*, 472 U.S. at 812.

The burdens imposed by litigation upon an absent class-action plaintiff are far less significant than those placed upon an absent defendant. *Shutts*, 472 U.S. at 808. The class action device "protects the interests of absent plaintiffs through court inquiry into the common nature of all claims, the adequacy of representation, proper jurisdiction over the class, as well as a judicial determination of the fairness and adequacy of any proposed settlement agreed upon by the parties." *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir.) (finding that mandatory state court class settlement released all claims related to a merger) (citing *Shutts*, 472 U.S. at 809-10), *cert. denied*, 513 U.S. 986 (1994).

In this case, each absent class member had sufficient minimum contacts with the State of California to support the trial court's exercise of specific jurisdiction over their claims. The class members each held an interest in a California limited partnership that participated in the consolidation.

Grimes v. Vitalink is directly on point. In *Grimes*, a non-resident class member owned stock in a Delaware corporation. He surrendered those shares in response to a tender offer. The Third Circuit held that he had sufficient contact to establish specific jurisdiction and bind himself to a class settlement and release entered by a Delaware state court. *Grimes*, 17 F.3d at 1569. The Third Circuit held that specific jurisdiction "requires only that a party be shown to have committed at least one act in the relevant forum which is substantially related to the claim

being adjudicated." *Id.* at 1559. "[T]he law has long put the buyer of corporate stock on notice that corporate rights attaching to stock ownership may be adjudicated in a single proceeding in another jurisdiction, including at a minimum the corporation's state of incorporation." *Id.* (quoting *Hynson v. Drummond Coal Co.*, 601 A.2d 570, 579 (Del. Ch. 1991)).[12]

The absent class members' ownership of interests in partnerships organized under California law is equivalent to the stock ownership in *Grimes* and establishes the necessary minimum contacts to support the exercise of personal jurisdiction over claims challenging the consolidation of their limited partnership interest into the REIT. Accordingly, the opt out right required by *Shutts* to support personal jurisdiction over absent class members is not implicated here.

Petitioners assert that in *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), the Ninth Circuit "stat[ed] that the constitutional right to opt out is *not* limited to those absent class members over whom" the court lacks jurisdiction. Pet. 4-5 (emphasis in original). *Epstein*, say petitioners, therefore conflicts with *Grimes*.

Epstein, however, held that *adequate representation* is a prerequisite to binding absent class members to a judgment, regardless of whether class members had "minimum contacts" with the forum. 126 F.3d at 1241-42. *Epstein* did not involve the right to opt out. While in *dicta*, the Ninth Circuit disapproved of *Grimes*' broader interpretation of the opt out right in *Shutts*, the holdings of *Grimes* and *Epstein* simply do not conflict.[13]

---

[12] According to *Hynson*, "merely holding . . . the shares of a corporation of that state itself creates a sufficient relationship with that jurisdiction to permit that jurisdiction to be one in which rights attaching to stock of the corporation may be conclusively adjudicated." 601 A.2d at 572.

[13] Petitioners also misread *Brown* as holding that the right to opt out "is not limited to persons over whom the trial court lacks *in personam* jurisdiction . . . ." Pet. 27. *Brown*, which involved Arizona plaintiffs' challenge to a Pennsylvania judgment, did not even discuss this issue.

D. Petitioners Do Not Have Standing To Complain About The Mandatory Class Since They Are Not Aggrieved Parties.

Finally, petitioners consented to the trial court's jurisdiction and therefore are not aggrieved parties as to the no opt out class. Personal jurisdiction is an individual liberty interest derived from the Due Process Clause of the Fourteenth Amendment. *Shutts*, 472 U.S. at 807. A plaintiff can therefore waive the personal jurisdiction requirement. *Id.* at 812 ("[a]ny plaintiff may consent to jurisdiction"). Petitioners have waived any jurisdictional challenge here.

First, petitioners did not cite to any evidence of their domiciles, and therefore have not shown that they lacked minimum contacts with California. This is not surprising since they did not raise the *Shutts* argument in the trial court. Rather, another non-appealing group of objectors raised this argument at the supplemental briefing stage. Petitioners cannot assert errors that allegedly affected only other class members. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Bailey v. Patterson*, 369 U.S. 30, 32-33 (1962).

Second, even assuming that all the petitioners are not Californians, they consented to the trial court's jurisdiction by appearing and pursuing their objections on the merits. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("When an objector submits to the court's jurisdiction, however, the Shutts dilemma is avoided."), *cert. denied*, 517 U.S. 1156 (1996).[14] Thus, petitioners lack standing to assert on appeal that the no opt out class violated their due process rights.

---

[14] Of course, a "party to a mandatory class action who appears in court to contest inclusion in the class is analogous to a party who appears merely to contest jurisdiction, and should be deemed to consent to jurisdiction *only if it actually litigates the . . . underlying merits of the case.*" *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995) (emphasis added). In challenging the underlying merits of the case, petitioners have "shown a willingness to engage in extensive litigation in the forum." *In re Real Estate Title*, 869 F.2d at 771. In this case, therefore, petitioners "have had their day in court to point out the shortcomings of . . . the settlement on the merits." *DeBoer*, 64 F.3d at 1176.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: September 18, 1998

Respectfully submitted,

Melvin R. Goldman*
Darryl P. Rains
Craig D. Martin
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
(415) 268-7000

Counsel for Respondents Glenborough Realty Corporation, Glenborough Corporation, and Robert Bationovich

**Counsel of Record*

Patrick J. Grannan SBN 115693
CHIMICLES, JACOBSEN & TIKELLIS
633 West Fifth Street, Suite 3300
Los Angeles, CA 90071
(213) 623-8100

Clinton A. Krislov
KRISLOV & ASSOCIATES, LTD.
Suite 810
222 North La Salle Street
Chicago, IL 60601-1086
(312) 606-0500

ATTORNEYS FOR PLAINTIFF

(Additional Plaintiff's Counsel Appear on Signature Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN MATEO COUNTY

ANTHONY E. BLUMBERG, on behalf of himself and all others similarly situated,	) CASE NO.) CLASS ACTION.
Plaintiff,	)
v.	)
GLENBBOROUGH REALTY CORPORATION (A CALIFORNIA CORPORATION); GLENBOROUGH CORPORATION (A CALIFORNIA CORPORATION); and ROBERT BATINOVICH,	)

Defendants,	) CLASS ACTION
	) COMPLAINT FOR
EQUITEC INCOME REAL ESTATE INVESTORS B, (A CALIFORNIA LIMITED PARTNERSHIP); EQUITEC INCOME REAL ESTATE INVESTORS C (A CALIFORNIA LIMITED PARTNERSHIP; EQUITEC INCOME REAL ESTATE INVESTORS-EQUITY FUND 4 (A CALIFORNIA LIMITED PARTNERSHIP); EQUITEC MORTGAGE INVESTORS FUND IV (A CALIFORNIA LIMITED PARTNERSHIP); EQUITEC 79 REAL ESTATE INVESTORS (A CALIFORNIA LIMITED PARTNERSHIP); OUTLOOK PROPERTIES FUND IV (A CALIFORNIA LIMITED PARTNERSHIP); GLENBOROUGH ALL SUITE HOTELS L.P. (A CALIFORNIA LIMITED PARTNERSHIP; GLENBOROUGH PENSION INVESTORS (A CALIFORNIA LIMITED PARTNERSHIP); and GLENBOROUGH REALTY TRUST INCORPORATED (A MARYLAND CORPORATION),	) 1. Breach of Fiduciary Duty) 2. Breach of Duty of Good Faith and Fair Dealing) AND PRAYER FOR INJUNCTIVE RELIEF
Nominal Defendants.	)

Plaintiff, by and through his undersigned attorneys, alleges upon information and belief, except as to himself, which facts are alleged on knowledge, as follows:

NATURE OF THE ACTION

1. This is a Class Action, brought by plaintiff, for himself and on behalf of all limited partner unitholders in eight real estate limited partnerships (the "Limited Partnerships" or "Partnerships") organized and existing under California law. Each of the Partnerships and the holders of their partnership units is similarly situated. Through this action, Plaintiff seeks injunctive relief and compensatory damages for himself and all other similarly situated unitholders arising from a proposed roll-up transaction (the "Roll-Up") being effected by the defendants whereby plaintiff and class members would exchange their current Limited Partnership interests for shares in a newly-formed corporation, Glenborough Realty Trust Incorporated ("GRTI"), which would then control, through an affiliate, the Partnerships' assets. The Roll-Up has the purpose and effect of unfairly entrenching management and of shifting upwards of 20% of the ownership of Partnership assets to the general partner defendants at the expense of plaintiff and members of the class.

2. Defendants, by means of the Roll-Up, are violating and will violate the rights of each and every class member. Defendants have geared the transaction to thwart the maximization of investment returns by class members through sale of the properties, substituting the Roll-Up for that sale. The Roll-Up is motivated solely by defendants' self-interested plan to maintain, entrench, and guarantee their positions of control over the Limited Partnerships' operations and defendants' receipt of on-going management fees. The Roll-Up is also designed and intended transfer over 20% of the assets of the Partnerships to the general partner defendants in return for an insolvent company. The actions of defendants in structuring the Roll-Up and their other actions taken in conjunction with

the Roll-Up constitute concerted action against the interests of Plaintiff and the class in violation of defendants' fiduciary duties under California law and their duty of good faith and fair dealing.

3. The general partner defendants have thus breached their fiduciary duties and their duty of good faith and fair dealing owed to plaintiff and the class members. Specifically, these defendants have devised ratios to allocate the securities to be issued in the Roll-Up which grossly favor said defendants and which do not accurately reflect the current fair have proposed for issuance and dissemination a misleading prospectus and consent solicitation statement to solicit and coerce the approval of the Roll-Up scheme. Plaintiff and class members have been and will be deceived, manipulated, frustrated, and damaged by defendants' actions. Plaintiff, individually and for the Class, seeks relief for injury suffered and to be suffered as a result of the defendants' breach of fiduciary duties and self-dealing in connection with their RollUp scheme, as set forth in this Complaint.

THE PARTIES

4. Plaintiff Anthony E. Blumberg is an individual who owns 20 units of Equitec Realty Income Partnership B, originally purchased for $5,000 during its initial public offering period. Plaintiff is being injured and threatened with injury by defendants' unlawful acts in the same manner as all other members of the proposed class, pursuant to a common scheme directed at all class members by defendants.

5. Defendant Glenborough Realty Corporation ("GRC") is a California corporation with its principal place of business in San Mateo, California. Defendant GRC is a wholly-owned subsidiary of defendant Glenborough Corporation. GRC has been one general partner of the eight Limited Partnerships that are the subject of the Roll-Up: Equitec Income Real Estate Investors B ("Equitec B"), Equitec Income Real Estate

Investors C ("Equitec C") Equitec Income Real Estate Investors—Equity Fund 4 ("Equitec 4"), Equitec Mortgage investors Fund IV ("Equitec Mortgage IV"), Equitec 79 Real Estate Investors ("Equitec 79"), Outlook Properties Fund IV ("Outlook IV"), Glenborough All Suite Hotels, L.P. ("All Suites") and Glenborough Pension Investors ("GPI"). GRC has been general partner of the Limited Partnerships since the date of final approval of general partner substitution indicated below:

Partnership:	Date:
Equitec B	February 18, 1992
Equitec C	February 18, 1992
Equitec 4	February 25, 1992
Equitec Mortgage IV	February 13, 1992
Equitec 79	April 9, 1992
Outlook IV	May 6, 1992
All Suites	February 22, 1994
GPI	April 4, 1994

6. Defendant Glenborough Corporation is a California corporation with its principal place of business in San Mateo, California, which is controlled by defendant Robert Batinovich and his affiliates. GC owns all of the issued and outstanding shares of GRC.

7. Defendant Robert Batinovich ("Batinovich") is the President of GRC. Defendant Batinovich maintains a business office in San Mateo, California. Robert Batinovich has been the other general partner of the eight Limited Partnerships since the same dates of final approval of general partner substitution indicated above. Defendant Batinovich controls GRC through his ownership and control over GC.

8. Defendants GC, GRC and Batinovich are collectively referred to herein as the "General Partner Defendants." By virtue of their position and their ability to control and direct the affairs of the Limited Partnerships, the General Partner Defendants are in a fiduciary relationship with plaintiff and

class members, and owe to plaintiff and class members the highest obligations of good faith, fair dealing, and full disclosure.

9. Defendant Equitec Income Real Estate Investors B is a limited partnership organized and existing under California law with its principal place business in San Mateo County. Equitec B is named as a nominal defendant only.

10. Equitec Income Real Estate Investors C is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec C is named as a nominal defendant only.

11. Equitec Income Real Estate Investors—Equity Fund 4 is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec 4 is named as a nominal defendant only.

12. Equitec Mortgage Investors Fund IV is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec Mortgage IV is named as a nominal defendant only.

13. Equitec 79 Real Estate Investors is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Equitec 79 is named as a nominal defendant only.

14. Outlook Properties Fund IV is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. Outlook IV is named as a nominal defendant only.

15. Glenborough All Suite Hotels, L.P. is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. All Suites is named as a nominal defendant only.

16. Glenborough Pension Investors is a limited partnership organized and existing under California law with its principal place of business in San Mateo, California. GPI is named as a nominal defendant only.

17. Each of the Partnerships is managed, directed and controlled, either directly or indirectly, by Defendants GRC, GC and Batinovich. No allegations of wrongdoing are made as against the Partnerships, other than those actions perpetrated by the General Partner Defendants. The Partnerships are named as nominal defendants as their absence from the action might interfere with the ability of the Court to grant complete relief to Plaintiff and the Class.

18. Glenborough Realty Trust Incorporated is a corporation organized and existing under Maryland law with its principal place of business in San Mateo, California. GRTI is the entity into which the partnerships will be rolled up pursuant to the General Partner Defendants' unlawful plan and scheme, and it is intended to qualify, post Roll-Up, as a real estate investment trust under Section 856 et seq. of the Internal Revenue Code. GRTI is named as a nominal defendant to assure that the Court may grant complete relief to Plaintiff and the Class.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action as a class action on his own behalf and on behalf of a class composed of all holders of units of the Limited Partnerships (the "Class"), who have suffered and will suffer harm as a direct result of the defendants' proposed Roll-Up scheme. Expressly excluded from the Class are defendants and each of their family members, affiliates, subsidiaries, officers, and directors.

20. The Class is so numerous that joinder of all members is impracticable. There are approximately 13,263 unitholders in the Limited Partnerships.

21. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class including:

a. Whether the General Partner Defendants have breached their fiduciary duties by engaging in a scheme to transfer substantial ownership benefits in the assets of the Limited Partnerships by means of the Roll-Up scheme, which is being implemented on unfair terms and in a coercive manner;

b. Whether the General Partner Defendants are furthering their RollUp scheme by engaging in fraudulent, deceptive, or manipulative acts and practices;

c. Whether the prospectus and consent solicitation statement to be issued in connection with the Roll-Up of the eight Limited Partnerships contains false or misleading statements, misrepresents material facts, or omits to state material facts required to be included therein;

d. Whether plaintiff and other members of the Class will be irreparably harmed if the defendants are not preliminary and permanently enjoined from the conduct described herein; and

e. Whether plaintiff and members of the Class have suffered and will continue to suffer damages as a result of the acts and omissions complained of herein.

22. Plaintiff's claims are typical of all members of the Class. The rights of all unitholders are similarly threatened by the defendants' attempt to unfairly shift ownership rights in over 20% of the Partnerships' assets to themselves. Plaintiff's claims, as an investor in one of the Limited Partnerships, and the claims of all Class members all arise from the same breach of fiduciary duties and are based on identical legal theories. Plaintiff and the members of the Class are being damaged in identical proportions based on the disproportionate ownership

rights which defendants have awarded themselves in the entity which will survive the Roll-Up.

23. Plaintiff is prepared to represent the interests of the Class members vigorously and has retained counsel experienced in similar litigation. No conflict exists between the interests of plaintiff and the interests of the Class. Plaintiff and the other Class members are all unitholders in the Limited Partnerships. Plaintiff and all of the Class members are being harmed by the acts of the defendants as herein alleged.

24. A class action is the most fair and efficient manner in which to adjudicate unitholders' claims arising out of defendants' conduct in connection with the proposed Roll-Up. Defendants have acted and refused to act on grounds generally applicable to the Class, which makes final injunctive relief appropriate on behalf of all Class members. In addition, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class, would create a risk of inconsistent rulings which might be dispositive of the interests of other Class members not parties to the adjudications, or which might substantially impede their ability to protect their interests. Further, the amount of individual damages suffered by each member of the Class, while significant in terms of the amounts of their investments, would not be sufficient to justify the expense of separate, individual actions. Should individual actions be brought, or be required to be brought, by each individual member of the Class, the resultant multiplicity of law suits would cause undue hardship and expense for the Court and the litigants.

25. Each of the defendants is based in San Mateo, California, and Plaintiff believes that much of the conduct which is at issue in this litigation was conceived, planned and carried out in this County. Consequently, it is desirable that the litigation of the claims of plaintiff and members of the Class be

concentrated in this Court. Plaintiff anticipates no difficulties in managing this case as a class action.

FACTUAL ALLEGATIONS
THE LIMITED PARTNERSHIPS' INITIAL ORGANIZATION

26. The Limited Partnerships were organized under California law during the period from 1979 through 1988 as real estate limited partnerships. Each of them offered and sold units of limited partnership interest to the public pursuant to prospectuses and registration statements that stated to prospective Limited Partnership investors, among other things, that the Limited Partnerships were formed to invest in income producing real property and/or mortgages. In general, the Limited Partnerships' original investment objectives were to acquire and operate real estate income properties, to preserve Partnership capital and provide cash distributions from operations to investors, while providing the potential for capital appreciation and increasing cash distributions through the ownership and eventual disposition of real estate. The Limited Partnerships were not publicly traded entities, and it was expected that the interests which the investors purchased would be held until liquidation and dissolution after three to twelve years, as provided in the limited partnership agreements of the Limited Partnerships.

27. Each of the Limited Partnerships is governed by a separate Agreement of Limited Partnership. These amended agreements (collectively, the "Partnership Agreements") have substantially uniform terms and requirements concerning the business, structure, and management of the Limited Partnerships.

GENERAL PARTNER COMPENSATION UNDER THE PARTNERSHIP AGREEMENTS

28. The Partnership Agreements spell out and limit the compensation to be paid to the General Partner Defendants. Each one provides for the General Partners to receive: (i) certain ongoing compensation for operating the Partnership, (ii) fixed shares of operating distributions from cash flow, and (iii) a "back-end" share of liquidating distributions -generally 1% until the limited partners have received back their uninvested capital plus a specified 10-16% return, with a General Partner bonus thereafter. (Registration Statement on Form S-4 Pre-Effective Amendment No. 2 at 20; id. at Exhibits 3.07, 3.11, 3.15, 3.18, 3.24, 3.26 and 3.28).

29. Based upon current values of the Limited Partnerships' real estate assets, a liquidation sale of the Partnerships' properties would produce only $2.9 million for the General Partners—$1.4 million in sales fees and $1.5 million in general partner proceeds. (Registration Statement on Form S-4 Pre-Effective Amendment No. 2 at 49). Additionally, a liquidation of the Limited Partnerships would end the substantial management fees presently being charged to the Partnerships.

30. As a consequence, the General Partner Defendants entered into a plan and scheme to effectuate the Roll-Up in violation of their fiduciary duties to Plaintiff and the Class, as well as their duty of good faith and fair dealing. In order to perpetuate their lucrative management position and to obtain a substantial equity interest of over 20 million dollars, defendants embarked upon their Roll-Up scheme.

THE ROLL-UP

31. The present terms of the Roll-Up are memorialized in a Registration Statement on Form S-4, filed with the Securities and Exchange Commission on or about September 1, 1994

bearing Registration No. 33-83506, which has been amended thereafter on September 12, 1994 and January 4, 1995. The January 4, 1995 Pre-Effective Amendment No. 2 is sometimes referred to in this complaint as the "S-4." The S-4 contains the current draft of the prospectus and consent solicitation statement which is to be issued by the General Partner Defendants to members of the Class to obtain their consent to the Roll-Up. According to the S-4, the Partnerships raised over $153 million in capital contributions from investors. Through September 30, 1994, total distributions to the Partnerships totaled only $77,843,615, approximately 1/2 of the initial investments. Indeed, Partners in only one of the Partnerships (Equitec 79) had received distributions which exceeded their original invested capital. These losses will be exacerbated if the Roll-Up is effectuated on the terms defendants presently propose.

32. If the Roll-Up is completed, the Limited Partnerships will be combined with GC and merged into GRTI. The separate existence of the Partnerships will cease, and GRTI will control the assets of the Partnerships through an affiliated partnership known as the Operating Partnership. Plaintiff and Class members will receive shares of common stock or notes issued by GRTI. At the heart of defendants' deceptive and improper scheme lies their decision to contribute GC to the Roll-Up in exchange for an excessively large ownership interest in the resulting entity, GRTI.

33. Through the Roll-Up, defendants will convert their ownership of a worthless management company, with a book value of negative $5.4 million ($3.9 million in assets subject to $9.3 million in debt), into a 22-28% interest in GRTI (valued at $21- $28 million) and a profit for defendants. Further, the Roll-Up will prevent the Limited Partnerships from selling their assets for their own profit, and incur (at the Partnerships' sole expense) tremendous and excessive fees, further reducing the assets accruing to the interest of Plaintiff and the other Class members.

34. A total of 6,871,615 shares in GRTI are to issued if all Partnerships participate in the Roll-Up. Of this a total of 1,610,912 shares will be allocated to the owners of GC assuming the Roll-Up is effectuated. S-4 at 93-94.

35. Specifically, the S-4 identifies three levels of allocation of interests in GRTI. S-4 at 76. The Level One allocation is between the Partnerships as a group and GC. The Level Two allocation is among the Partnerships. The Level Three allocation is between the General Partners and the limited partners of each Partnership.

36. In making the Level Two allocation, the defendants obtained separate appraisals of the real estate values held by each of the eight Limited Partnerships. However, the Level One allocation arbitrarily allocated 20-24% of GRTI to GC (which is affiliated with the other General Partner Defendants) without any appraisal of GC's business or assets. Instead, allocation at Level One was accomplished pursuant to a different methodology which focused upon the relative cash flow of GC on the one hand, and the Partnerships on the other. This was done because GC, unlike the Partnerships, was technically insolvent, with a negative networth of $5.4 million..

37. According to the S-4, the Limited Partnerships have a value of $82.2 million. Allocating GC a 20.24% share of this appraised value would correspond to a $103.06 million total value of GRTI and a valuation of GC interests at over $20.86 million.

38. This $20 million valuation for the GC interests constitutes an outrageously unfair and excessive valuation for the following reasons:

a. The Book Value of GC is substantially negative; GC has assets of only $3.9 million, less $9.3 million in debt obligations which will be taken over by GRTI.

b. The $20 million valuation constitutes the application of a multiplier of more than 7 times GC's most recent

net earnings without reduction for its substantial debt obligations that will be relieved in the Roll-Up.

c. With no appraisal at all, the GRC/GC management group has been arbitrarily assigned a 20.24% share of GRTI plus its General Partners' share of each Limited Partnership as if each Partnership had been liquidated.

d. The General Partners' share of the eight Partnerships amounts to 22,421 additional shares and would bring GRC/GC's total ownership to 1,413,236 shares or 20.56% of GRTI's 6,871,615 total shares. When added to the allocation of 197,676 shares attributable to GRC/GC's ownership of Limited Partnership interests, GRC/GC's resulting total will be 1,610,912 shares or 23.44% of GRTI. Depending upon the number of Partnerships which elect to participate, as well as other factors, the allocation to the General Partner Defendants may exceed 27% of GRTI's shares.

39. In order to finalize the Roll-Up scheme pursuant to the terms of the current Partnership Agreements, the defendants need to receive the approval of a majority of the limited partners in each Limited Partnership. Any Limited Partnership that fails to approve the Roll-Up by not providing a majority vote in favor will not be included in the Roll-Up and will remain an independent partnership entity. Any Limited Partnership that does approve the Roll-Up will exchange all of its outstanding limited partnership units for newly issued shares and notes. The proposed solicitation materials for that vote are deceptive and misleading as more fully described below.

THE NOTES AS AN ALTERNATIVE TO APPRAISAL RIGHTS UNDER THOMPSON-KILLEA ACT

40. Purporting to satisfy the provisions of California's Thompson-Killea Limited Partner Protection Act of 1992, the defendants have structured the Roll-Up to permit investors to elect to receive up to 20% of the total Exchange Value in the form of subordinated, unsecured Notes due in the year 2002

(the "Notes") instead of GRTI shares. But the interest rate on the Notes (120% of the federal 3 year note rate) is so low for the risk involved that the Notes are certain to sell, if at all, at a substantial discount from their face/exchange value.

41. Under the Thompson-Killea Limited Partner Protection Act of 1992, certain presumptions relating to the fairness of roll-up transactions are created under California law. While the S-4 states that the Roll-Up is intended to comply with Thompson-Killea, that statement is false and misleading, and is designed to foster the incorrect impression among Class members that their rights are being duly protected in the context of the Roll-Up.

42. Under Thompson-Killea, a presumption is created that the rights of limited partners are protected in a roll-up transaction if the transaction provides that a dissenting limited partner will receive compensation for his, her, or its limited partnership units based on an appraisal of the limited partnership assets performed by an independent appraiser unaffiliated with the sponsor or general partner of the limited partnership and which values the assets as if sold in a orderly manner in a reasonable period of time, plus or minus other balance sheet items, less the costs of sale or refinancing. Compensation on account of such appraised value to be given to dissenting limited partners in a roll-up transaction may be in the form of cash, secured debt instruments, unsecured debt instruments, or freely traded securities. However, to fall within the statutory presumption of fairness, debt instruments or freely tradable securities must meet certain specified requirements.

43. The Roll-Up fails to fall within the statutory presumption of fairness established under Thompson-Killea because the allocation mechanism employed in the context of the Roll-Up does not assure that dissenting limited partners will receive the appraised value of their pro rata share of the limited partnership assets plus or minus other balance sheet items and less the cost of sale or refinancing. Instead, pursuant to the terms of the Roll-Up as described in the S-4, dissenting limited

partners will receive far less. This is a function of both the allocation of shares to GC pursuant to the terms of the Roll-Up, as well as the fact that the total amount of Notes available to be issued under the Roll-Up is limited. If there are a sufficient number of dissenting limited partners, it is possible that there will not be sufficient Notes for all dissenting limited partners.

44. Moreover, dissenting limited partners who fail to make an effective election to receive Notes will, instead, receive shares in GRTI. However, in view of the fact that the GRTI shares have not traded on a certified national securities Exchange or on the interdealer quotation system of the National Association of Securities Dealers, Inc. for one year, the shares of GRTI do not qualify as freely tradeable securities under Thompson-Killea.

BREACH OF DUTY TO MAXIMIZE VALUE

45. Under well-established fiduciary law, management that has decided to acquire an entity's businesses or assets for itself must first seek to obtain maximum value by seeking to auction or otherwise sell those businesses or assets to the highest bidder, without imposing obstacles to preserve management's position or purchase opportunity. The General Partner Defendants breached this duty by entering into the Roll-Up scheme without making any effort to market the properties of the Partnerships.

FUNDAMENTAL UNFAIRNESS OF THE ROLL-UP

46. The defendants' Roll-Up plan is unfair and coercive for at least the following reasons:

a. Plaintiff and Class members are being compelled to vote in favor of forfeiting ownership of their existing securities in defined, finite-life real estate limited partnership entities in exchange for units of a newly-

created, publicly traded corporation with no definite composition and, thus, no definable asset value, net worth, earnings, cash flow, or liquidation value on which to base their investment decision.

b. Plaintiff and Class members are precluded from receiving objective investment advice from the General Partners regarding their voting decisions on the Roll-Up, because General Partners and the individual defendants are receiving substantial compensation as a result of the Roll-Up, while their continued receipt of compensation may be of limited duration otherwise.

c. The voting process forces those limited partners who vote against the Roll-Up, but whose Limited Partnerships approve the Roll-Up, to become shareholders and/or noteholders of GRTI against their will.

d. The proposed prospectus and consent solicitation statement fails to disclose any valuation data which would permit Class members to make an informed assessment of the allocation of GRTI shares to the General Partners Defendants and their affiliates, and falsely states that the Roll-Up complies with the requirements of the Thompson-Killea Limited Partner Protection Act of 1992.

e. The Roll-Up provides for an excessive and unfair allocation of GRTI shares to the General Partner Defendants.

f. The Roll-Up is the product of self-dealing by the General Partner Defendants.

47. In the event that the Roll-Up is consummated, plaintiff and Class members will be irreparably damaged in that they will have lost their interests in the Limited partnerships in exchange for units in GRTI.

FIRST CAUSE OF ACTION
(Claim for Breach of Fiduciary Duty
Against GC, GRC and Batinovich)

48. Plaintiff incorporates by reference and repeats and realleges Paragraphs 1 through 47 above, as if fully set forth herein.

49. The General Partner Defendants, by reason of their position as general partners of the Limited Partnerships, are in a fiduciary relationship with plaintiff and Class members and owe plaintiff and Class members the highest obligations of good faith, fair dealing, and full disclosure.

50. Defendants breached their fiduciary duties to plaintiff and Class members by jointly orchestrating the Roll-Up scheme in order to convey economic benefits to the defendants, in the form of a $20 million interest in GRTI, in return for a technically insolvent entity using unfair terms and coercion, and with the intent to disseminate a false and misleading prospectus/consent solicitation statement.

51. The proposed Roll-Up is not in the best interests of plaintiff and Class members. The Roll-Up is a violation of the defendants' obligation to direct the affairs of the Limited Partnerships in good faith for the investors and not for purposes of self-dealing and taking unfair advantage of said investors.

52. The conduct of each of the defendants as herein alleged was undertaken deliberately, willfully, and in conscious disregard of the rights of plaintiff and Class members and was intended and directed to harm the Limited Partnerships and their limited partners and to advance the personal interests of the General Partner Defendants in violation of the fiduciary duties that each of said defendants owes to plaintiff and the Class members.

53. Plaintiff and Class members have no adequate remedy at law. if defendants are not enjoined from consummating the

Roll-Up, plaintiff and the Class members will suffer irreparable injury.

SECOND CAUSE OF ACTION
(Claim for Breach of Duty of Good Faith and Fair Dealing Against GC, GRC and Batinovich)

54. Plaintiff incorporates by reference and repeats and realleges Paragraphs 1 through 53 above, as if fully set forth herein.

55. Plaintiff and the other Class members held a reasonable expectation that defendants would act to maximize their interests and subordinate any incentive-based return to the General Partners until the unitholders realized a full return on their capital contribution plus growth, as represented in the original Partnership Agreements to which the General Partner Defendants voluntarily became bound on the dates alleged above. By voluntarily assuming the duties and status of a general partner in the Partnerships under the Partnership Agreements, the General Partner Defendants became subject to an implied covenant of good faith and fair dealing which barred them from taking actions that would prevent Plaintiff and the Class members from receiving the benefits of the Partnership Agreements.

56. Defendants' attempt to effect the Roll-Up, to subvert bona fide dissenters' appraisal rights by the use of coercive low-interest notes, and to dilute the value of unitholders' interests in the Partnerships through both the excessive valuation of GC and the payment of excessive fees associated with the Roll-Up constitute an obvious departure from the standards of good faith and fair dealing imposed upon defendants under California law and the Partnership Agreements.

57. Defendants' conduct substantially defeats the reasonable expectations of the Class in committing their capital to the Limited Partnerships at their inception and utilizes defendants' exclusive control and superior position to oppress

the unitholders, to commit fraud upon their fights, and to deprive the unitholders of the benefits of their investment.

58. Defendants' oppressive behavior threatens to prejudice the rights and interests of the members of the Class and would deprive Class members of a substantial financial benefit that would otherwise accrue to them.

59. Plaintiff and the Class members have no adequate remedy at law. If defendants are not enjoined from consummating the Roll-Up, plaintiff and the Class members will suffer irreparable injury.

IRREPARABLE INJURY

60. As a result of the foregoing conduct on the part of the defendants, plaintiff and the members of the Class have sustained and will continue to sustain irreparable injury in the absence of action by this Court. As described in greater detail above, unless this Court assumes equitable jurisdiction and otherwise orders the Defendants to act in accordance with their fiduciary obligations and other duties under California law, they will continue to act in accordance with their coercive and improper scheme in breach of their fiduciary duties and their duty of good faith and fair dealing. Plaintiff and the Class lack an adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, individually and on behalf of the members of the Class, demands the following relief:

A. An Order certifying this action as a class action on behalf of the proposed plaintiff Class (i.e. all unitholders in the affected Limited Partnerships excluding defendants and their affiliates);

B. A declaration that the defendants have breached their legal duties to limited partners of the Limited Partnerships;

C. An Order preliminarily and permanently enjoining Defendants from effectuating the Roll-Up of the Limited Partnerships, and, if consummated, rescinding the RollUp and setting it aside except based on a fair and independent valuation of the GC assets;

D. An Order requiring defendants to account for all profits realized from their improper conduct challenged herein;

E. An Order awarding compensatory damages in an amount to be determined upon proof submitted to the Court;

F. An award of costs and disbursements of this action, reasonable attorneys, fees and expenses, and such other and further relief as the Court may deem just and appropriate.

Dated: February 20, 1995 Respectfully submitted,

CHIMICLES, JACOBSEN & TIKELLIS

By: /s/ PATRICK J. GRANNAN
Patrick J. Grannan
633 Fifth Street
Suite 3300
Los Angeles, CA 90071
(213) 523-8100

CLINTON A. KRISLOV
KRISLOV & ASSOCIATES, LTD.
222 North LaSalle Street
Suite 810
Chicago, IL 60601
(312) 606-0500
CHIMICLES, JACOBSEN & TIKELLIS
James R. Malone, Jr.
361 West Lancaster Avenue
Haverford, PA 19041
(610) 642-8500

ATTORNEYS FOR PLAINTIFF AND THE CLASS

Patrick J. Grannan SBN 115693
CHIMICLES, JACOBSEN & TIKELLIS
633 West Fifth Street, Suite 3300
Los Angeles, CA 90071
(213) 623-8100

Clinton A. Krislov
KRISLOV & ASSOCIATES, LTD.
Suite 810
222 North La Salle Street
Chicago, IL 60601-1086
(312) 606-0500

ATTORNEYS FOR PLAINTIFF

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR SAN MATEO COUNTY

ANTHONY E. BLUMBERG, on behalf of himself and all others similarly situated, *Plaintiff,* v. GLENBOROUGH REALTY CORPORATION (A CALIFORNIA CORPORATION); GLENBOROUGH CORPORATION (A) CALIFORNIA CORPORATION); and ROBERT BATINOVICH, *Defendants,* EQUITEC INCOME REAL ESTATE INVESTORS B, et al., *Nominal Defendants.*	) CASE NO. 391223) CLASS ACTION)))))) DECLARATION OF) CLINTON A. KRISLOV) IN SUPPORT OF) REQUEST FOR FINAL) APPROVAL OF CLASS) ACTION SETTLEMENT) AND PETITION FOR) AN AWARD OF) ATTORNEY'S FEES) AND EXPENSES) Date: December 21, 1995) Time: 9:00 a.m.) Dept.: 4) Trial: None) Disc. cut-off: None)

I, Clinton A. Krislov, declare:

1. I am an attorney-at-law, duly admitted to practice in the State of Illinois. I am the founder and principal of the law firm of Krislov & Associates, Ltd. I am submitting this Affidavit in support of my firm's application for an award of attorneys, fees in connection with services rendered to the plaintiff class and the reimbursement of expenses incurred by my firm in the course of this litigation.

2. I personally handled all negotiations with the defendants concerning class counsel's application for an award of attorney's fees and expenses. All discussions concerning attorney's fees were entirely independent of the settlement negotiations and occurred *only after* we had reached a final agreement on all of the substantive terms of the settlement.

3. I began monitoring this proposed rollup with the first S.E.C. filing on September 1, 1994. I have particular experience in successfully identifying and challenging unfair rollup transactions. *See, e.g., In re Prudential-Bache Energy Income Partnerships Securities Litigation*, No. MDL 888 (E.D. La. 1994); *In Re Franchise Finance Corp., of America Litigation*, C.A. No. 13073 (Del. Ch. 1994). I identified three areas in which the original proposal and filings were deficient: first, the allocation of interests between the general partner/ management group and the limited partners was disproportionate; second, there was not full disclosure of the risks that were peculiar to this transaction; and third, there were not significant protections against an immediate decline in the market value of the resulting entity after the rollup.

4. After having identified these problem areas in the original registration statement, I engaged an outside expert consultant to study the financial aspects of the transaction in greater depth and to review the transaction as it progressed. Our expert continued to study the proposed transaction after we filed suit in February 1995. When we filed suit, our primary orientation was to challenge the Level one allocations (i.e., maximizing the

shares allocable to the partnerships), to the supplement the risk disclosures of the transaction to the limited partners, and to achieve as much protection an possible for the post-rollup market value of the shares received. Thus, when Glenborough Corp.'s Level one allocation percentage did not change after the addition of the Rancon management contracts, which increased Glenborough Corp.'s contribution to cash flow by over 50%, we determined that the rollup was within the range of reasonableness with respect to that aspect of the deal. We then proceeded to negotiate the additional disclosures and the protective aspects of the terms of the rollup which help ensure the market strength of the shares following the rollup.

5. By the end of June 1995, we were able to negotiate a settlement on all of the substantive text, and a settlement agreement was drafted and circulated. *Only then* did we begin to negotiate the attorney's fees issues at all. When we reached an impasse on this issue, we sought ways to surmount the impasse. After examining various alternatives, Mel Goldman and I agreed to meet on September 6, 1995, at the new Denver International Airport, to discuss and resolve any open issues. Only after assuring ourselves that we had agreed on all substantive terms, did we then begin negotiations over fees and were, after some hours, able to reach agreement on the figure ultimately agreed upon.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Chicago, Illinois on December 18, 1995.

/s/ CLINTON A. KRISLOV

Clinton A. Krislov

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, Suite 3300, Los Angeles, California 90071.

On December 18, 1995, 1 served the foregoing document described as **DECLARATION OF CLINTON A. KRISLOV IN SUPPORT OF REQUEST FOR A FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PETITION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES** on the parties in this action, as follows:

X By placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached service list;

SEE SERVICE LIST

XX By Mail: I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

By Facsimile: I caused such document(s) to be sent to the address above via the facsimile number indicated.

By Personal Service as indicated: I caused such envelope to be delivered by hand to the offices of the addressee.

XX By Federal Express: I caused such document(s) to be sent Federal Express next day delivery an stated on the attached service list.

XX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I as aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than I day after the date of deposit for mailing in affidavit.

Executed on December 19, 1995 at Los Angeles, California.

/s/ Laura Sesti

LAURA SESTI

SERVICE LIST

Anthony Blumberg, et al. v. Glenborough Realty, et al,

San Mateo Superior Court Case No. 391223

CLASS ACTION

CLINTON A. KRISLOV
KRISLOV & ASSOCIATES, LTD.
222 North La Salle Street
Suite 810
Chicago, IL 60601-1086
(312) 606-0500

MELVIN R. GOLDMAN
DARRYL P. RAINS
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104-2675
(415) 667-7000

LIONEL Z. GLANCY
PETER A. BINKOW
LAW OFFICES OF LIONEL Z. GLANCY
1299 Ocean Avenue
Suite 323 Santa Monica, CA 90401
(310) 319-3277

ANDREW FRIEDMAN
WECHSLER HARWOOD HALEBIAN A FEFFER
805 Third Avenue
7th Floor
New York, NY 10022
(212) 935-7400

VINCENT T. GRESHAM
Attorney At Law
6065 Roswell Road
Suite 144
Atlanta, Georgia 30328

JANICE SCHOEN
OMNI TRUST
3111 Bel Air Drive
Las Vegas, NV 89109
(702) 792-2693

SERVICE LIST

Anthony Blumberg, et al. v. Glenborough Realty, et al,

San Mateo Superior Court Case No. 391223

CLASS ACTION

LINDA S. McNEER
177 Lake Drive
Mountain Lakes, NJ 07046

LAW OFFICES OF JOHN W. ALLURED
One Montgomery Street
Suite 1400
San Francisco, CA 94104

FARROW, BRAMSON, BASKIN & PLUTZIK
Alan. R. Plutzik
Edward Romero
2125 Oak Grove, Suite 120
Walnut Creek, CA 94598

LAW OFFICES OF JOHN W. ALLURED
John W. Allured (State Bar No. 84770)
One Montgomery Street, Suite 1400
San Francisco, California 94104
Telephone: (415) 837-2990

FARROW, BRAMSON, BASKIN & PLUTZIK
Alan R. Plutzik (State Bar No. 77785)
2125 Oak Grove Road, Suite 120
Walnut Creek, California 94598
Telephone: (510) 945-0200

Attorneys for Class Members Donald A. Barnett, Sheila Gold, Ronda Chaney, Lon Chaney, Jr., William P. Mitchell and Robert Q. Buickerood, Trustee of the Buickerood 1989 Revocable Living Trust

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

ANTHONY BLUMBERG et al., *Plaintiffs,* v. GLENBOROUGH REALTY CORPORATION, GLENBOROUGH CORPORATION, ROBERT BATINOVICH et al., *Defendant.*	) Case No. 391223)) OBJECTION OF) CLASS MEMBERS) DONALD A.) BARNET, SHEILA) GOLD, RONDA) CHANEY, LON) CHANEY, JR.,) WILLIAM P.) MITHCELL AND) ROBERT Q.) BUICKEROOD,) TRUSTEE, TO) FINAL APPROVAL) OF SETTLEMENT)) Date: December 21,) 1995) Time: 9:00 a.m.) Dept.: 99)

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	THE NATURE OF THE CLAIMS WHICH WOULD BE RELEASED IF THE SETTLEMENT WERE TO BE APPROVED BY THIS COURT	4
	A. The Rollup Transaction Is Grossly Unfair to the Limited Partners	4
	1. Too Much Stock In The REIT Has Been Allocated To The General Partners And Their Affiliates, So As To Unfairly Dilute The Limited Partners' Ownership Interests	4
	(i) Failure to Allocate in Accordance with the Relative Value of the Assets Contributed to the REIT	6
	(ii) Inappropriate and Inconsistent Calculation of Cash Flow	7
	(iii) The General Partners Improperly Relied on "Adjusted" Cash Flow From A year Whose Results Were Inflated By Extraordinary Income	9
	(iv) Failure to Consider Determinants Of Value Other Than Cash Flow	10
	2. The Rollup is Also Unfair Because It Deprives The Limited Partners of Valuable Rights and Extends Substantial Benefits To The General Partners At The Limited Partners' Expense	11
	a. The Rollup Entrenches Management And Prevents The Partnerships From Liquidating Or Adopting Other Strategies To Maximize Returns to The Limited Partners	11

TABLE OF CONTENTS
(continued)

b. Elimination of $63 Million of Accumulated Rights to Preferred Annual Returns 12
c. Unfair Imposition of Massive Transaction Costs On The Limited Partners 13
d. Elimination of Debts, Personal Guarantees And Tax Liability and Other Benefits For The General Partners and Their Affiliates 13
B. The Prospectus is Materially False and Misleading 14
III. APPLICABLE LEGAL STANDARDS 19
IV. THE SETTLEMENT IS NOT FAIR, REASONABLE AND ADEQUATE 21
A. The Settlement Confers No Meaningful Benefit On The Class 21
B. The Settlement was "Negotiated" at an Early Stage of the Litigation 25
C. The Settlement is "Tainted" by Virtue of the Provisions Concerning the Plaintiff Incentive Bonus and Plaintiff's Attorneys Fees 26
D. The Ability of Defendants to Withstand a Greater Judgment 26
E. The Reaction of the Class Members 27
F. The Complexity, Expense and Likely Duration of the Litigation 27
V. CONCLUSION 28

TABLE OF AUTHORITIES

CASES	PAGE(S)
Armstrong v. Board of School Directors of the City of Milwaukee, 616 F.2d 305, 314 (7th Cir. 1980)	20
Buchet v. ITT Consumer Financial Corp., 845 F.Supp. 684 (D.Minn. 1994)	20
City of Detroit v. Grinnell Corp., 495 F.2d 448, 462-463 (2d Cir. 1974)	passim
Ficalora v. Lockheed California Co., 751 F.2d 995, (9th Cir. 1985)	20,26
Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975)	19
I.U.E. v. Unisys Corp., 858 F.Supp. 1243, 1264 (E.D.N.Y. 1994)	19
In re General Motors Corp., Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. cert. denied 444 U.S. 870 (1979)	20
In re Oracle Securities Litigation, 829 F.Supp. 1176 (N.D.Cal. 1993)	20,27
In re Traffic Executive Ass'n—Eastern Railroads, 627 F.2d 631 (2d Cir. 1980)	20
Mars Steel v. Continental Illinois National Bank & Trust Co. of Chicago, 834 F.2d 677 (7th Cir. 1987)	19
Reynolds v. King, 790 F.Supp. 1101 (M.D.Ala. 1990)	20
Schneider v. Vennard, 183 Cal.App.3d 1340 (1986)	19
Sherman v. Lloyd, 181 Cal. App. 693 (1986)	14
Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) cert. denied, 464 U.S. 818 (1983)	19

TABLE OF AUTHORITIES
(continued)

CASES	PAGE(S)
State of West Virginia v. Chas, Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U.S. 871 (1971)	20
STATUTES	
15 U.S.C. §§77k; 771	21
15 U.S.C. §78j(b)	21
Limited Partnership Rollup Reform Act of 1993, 15 U.S.C. §78n(h)	1
Killea-Thompson Act, Cal. Corp. Code §25014.5	1
MISCELLANEOUS	
John Geschke, *Regulating Rollups: General Partners' Fiduciary Obligations in Light of the Limited Partnership Rollup Reform Act of 1993*, 47 Stan.L.Rev. 85 (1994)	1,12

I. INTRODUCTION

Class members Members Donald A. Barnett, Sheila Gold, Ronda Chaney, Lon Chaney, Jr., William P. Mitchell and Robert Q. Buickerood hereby file this obection to the final approval of the proposed settlement of this class action. This action arises out of a proposed consolidation of eight real estate limited partnerships[1] into Glenborough Realty Trust Incorporated, a publicly-traded real estate investment trust, or "REIT" (the "REIT"). Under the terms of the Consolidation, the limited partners of the Partnerships are to surrender their interests in the Partnerships in exhange for shares of common stock in the REIT. Defendants Robert Batinovich ("Batinovich") and Glenborough Realty Corporation, who are the general partners of the Partnerships (collectively, "the General Partners"), will also receive shares of common stock in the REIT in exchange for contributing to it (1) Glenborough Corporation ("GC"), a management company controlled by Batinovich, (2) assorted other businesses and interests, and (3) their general partnership interests in the Partnership. The Consolidation is of a type commonly referred to as a "rollup", and is hereinafter referred to as the "Rollup" or the "Rollup Transaction".[2]

---

(1) These are Equitec Income Real Estate Investors B, Equitec Income Real Estate Investors C, Equitec Income Real Estate Investors—Equity Fund IV, Equitec Mortgage Investors Fund IV, Equitec 79 Real Estate Investors, Outlook Properties Fund IV, Glenborough All Suite Hotels, L.P., and Glenborough Pension Investors (collectively, "the Partnerships").

(2) 'Rollups" have been extensively criticized on the ground that they almost always benefit and enrich the general partners at the expense of the limited partners. *See, e.g.*, John Geschke, *Regulating Rollups: General Partners' Fiduciary Obligations in Light of the Limited Partnership Rollup Reform Act of 1993*, 47 Stan.L.Rev. 85 (1994). Indeed, perceived abuses by general partners in effectuating such transactions led to both federal and state legislation to prevent further abuse. See Limited Partnership Rollup Reform Act of 1993 (15 U.S.C. §78n(h) *et seq.*; Killea-Thompson Act (Cal. Corp. Code §25014.5 *et seq.*)

The Class Action Complaint (the "Complaint"), which purported to have been brought by plaintiff Anthony Blumberg as a class action on behalf of all limited partners in the Partnerships, alleged that the Rollup is unfair to the limited partners in that, *inter alia*, (1) the Consolidation was designed to perpetuate the General Partners' ability to earn management fees and other consideration (Complaint at ¶¶28—30; 46), (2) the Consolidation would prevent the limited partners from realizing value on the sale of the Partnerships' assets (*id.* at ¶33); and (3) the shares of common stock of the Company to be issued to the General Partners are excessive and disproportionate (*id.* at ¶¶32-33; 38; 46). The Complaint alleged two causes of action, *i.e.*, for breach of fiduciary duty and breach of the duty of good faith and fair dealing, and sought to enjoin the Consolidation.

However, barely four months after the Complaint was filed—and without having conducted any formal discovery, without having sought preliminary or final injunctive relief against defendants, and, indeed, without even having required defendants to respond to the Complaint—plaintiff Blumberg agreed to settle the litigation in its entirety. Significantly, this settlement encompasses not only plaintiff Blumberg's individual claims, but also those of a plaintiff class consisting of all of the 13,000 persons who hold limited partnership interests in any of the Partnerships. Moreover, despite the fact that focus of the original Complaint was for injunctive relief—*i.e.*, to prevent the Consolidation—, the settlement purports to conclusively settle, release and bar any and all claims (including claims for damages) which the class members may have relating to this $96 million transaction, without affording the class members any right to "opt-out" or exclude themselves from the class. Finally, even though no person or entity other than the named defendants are parties to the settlement (or in any way involved in the litigation), the scope of the claims settled, released, and barred extends not only to the named defendants and their affiliates, but rather to any and all persons. Thus, the settlement extinguishes *all* claims—of any kind or nature—which *any*

limited partner might have against *any* person concerning the Rollup.

More important, this "settlement" confers no meaningful benefit on the members of the plaintiff class. Despite purporting to settle, release and permanently bar any and all claims for money damages or equitable relief (such as rescission), the settlement does not require defendants to pay *one dime* to the plaintiff class. Similarly, the settlement does not increase by *one share* the allocation of common stock to be received by the limited partners in connection with the Rollup. Rather, the settlement merely requires defendants to add four "curative disclosures" —totalling some *eight sentences*—to the five hundred (500) page Prospectus, modifies one purported "restriction" on defendants' ability to sell stock after the Rollup, and limits the Company's ability to grant stock options to *employees*. These "benefits" are totally insignificant.

With respect to the plaintiff Blumberg and his counsel, however, the settlement does provide very substantial—and tangible—benefits. According to the terms of the settlement, plaintiff Blumberg is entitled to seek an "incentive bonus" of $10,000, and his counsel is entitled to seek attorneys' fees in the amount of *eight hundred and fifty thousand dollars*! Even worse, the bonus and the fees will not be paid by the defendants, but rather by the REIT—an entity which will not have economic substance unless and until the Rollup is approved. Thus, plaintiff and his counsel are not only no longer opposed to the Rollup, they have become, in effect, advocates for that transaction! Consequently, apart from its other problems, the settlement creates a direct, substantial, and irreconciliable conflict of interest between plaintiff and his counsel, on one hand, and the class members, on the other.

While this settlement would be objectionable under virtually any circumstances, it is especially so here, where the claims of the class members against the General Partners are extremely strong. As explained below, the Rollup is (as the Complaint in this matter originally alleged) grossly unfair to the

limited partners in that, *inter alia*, (1) as a result of the change in the structure of the limited partners' investment, *i.e.*, from a limited partnership to a corporation, the limited partners will lose numerous important rights and investment benefits, including the right to a preferred return on investment (the current accumulated value of which is some $63 million), (2) the limited partners' ownership interests will be substantially diluted as a result of an excessive and improper allocation of shares of common stock to the General Partners, and (3) the limited partners will incur millions of dollars in transaction costs alone—as well as suffer adverse tax consequences—without any corresponding benefit. At the same time, the Rollup will result in substantial benefits to the General Partners, including (1) tax benefits (not shared by the limited partners) of approximately $19 million, (2) relief from approximately $14.3 million of debt of GC, (3) elimination of at least approximately $4.3 million of liability to the limited partners, and (4) an allocation of common stock in the Company which is excessive and disproportionate to the interests being contributed by the General Partners (and others). Thus, it is clear that the Rollup amounts to a clear breach of the fiduciary (and other) duties owed by the General Partners to the 'limited partners of the Partnerships.

In short, this settlement constitutes a complete abandonment of the rights of the class members in exchange for substantial attorneys' fees. Under the legal—and equitable—principles which govern this Court's review of the settlement, the settlement cannot—and must not—be allowed to stand. Therefore, the motion for final approval of the settlement must be denied.

II. THE NATURE OF THE CLAIMS WHICH WOULD BE RELEASED IF THE SETTLEMENT WERE TO BE APPROVED BY THIS COURT

To evaluate the merits of the settlement, the Court must consider the nature of the claims which would be released and extinguished if the settlement were to be approved. Those

claims which include, without limitation, claims that the Rollup Transaction is unfair to the limited partners of the Partnerships, and that the defendants have misled the limited partners in attempting to induce them to vote in favor of the Rollup, are serious, substantial and supported by clear and compelling evidence.

A. The Rollup Transaction Is Grossly Unfair to the Limited Partners

The Rollup Transaction, as described in the Prospectus,[3] is grossly unfair to the limited partners in several respects.

1. Too Much Stock In The REIT Has Been Allocated To The General Partners And Their Affiliates, So As To Unfairly Dilute The Limited Partners' Ownership Interests

The Rollup is unfair, first, because it allocates an excessive amount of stock in the REIT to the General Partners and entities controlled by them, thus unfairly diluting the limited partners' share and giving a windfall to the General Partners. That allocation has been carried out pursuant to a faulty and biased methodology which violates every principle of fairness and equity.

The REIT, as described in the Prospectus, will consist basically of two kinds of assets—commercial and industrial real estate, which is being contributed by the Partnerships and related entities (hereinafter, the "Allocation Partnerships"), and a management company, GC, which is substantially owned or controlled by the General Partners. The real estate which the Allocation Partnerships are contributing to the REIT generates income from rents, and also has a substantial underlying value in that it can be sold on the open market. GC, on the other hand, is a service business. It generates income by performing property management services, and does not own significant or

---

(3) A copy of the Prospectus, in its entirety, is attached to the Declaration of Alan R. Plutzik, filed herewith, as Exhibit A.

valuable fixed assets. GC's future prospects are dependent on the extent to which it can count on a continuing flow of management fees from the Partnerships and other entities. Any reduction in such fee income—such as might result if one or more of the Partnerships liquidated its assets and distributed the proceeds to its limited partners—would cause a direct and material diminution of GC's bottom line.

The General Partners have allocated the REIT's stock between the Allocation Partnerships and the shareholders of GC (*i.e.*, themselves and their affiliated persons and entities) so as to give the GC shareholders a disproportionate share of the stock. They have allocated approximately 5.15 million shares, or 79.76% of the REIT's stock, to the Allocation Partnerships, and approximately 1.3 million shares, or 20.24% of the stock, to the shareholders of GC.[4] If we exclude from the calculation certain of the Allocation Partnerships which are themselves owned or controlled by the General Partners, the division of stock between the remaining Partnerships and the shareholders of GC is in the ratio of 78% to 22%. In other words, for every 3.5 shares allocated to the limited partners, the GC shareholders will receive one share. *Id. See* the Declaration of valuation expert Robert F. Reilly, filed herewith (the "Reilly Declaration"), at ¶2. This division presupposes that the value of GC is 29% (.22/.78) of the value of the real estate assets contributed to the deal by the Partnerships. *Id.*

The General Partners have themselves suggested that the real estate assets contributed to the REIT by the Partnerships are worth between $65 and $76 million.[5] Thus, to justify giving the shareholders of GC as much as 29% of the REIT stock which the investors in the Partnerships will receive, the value of GC would have to be between $18 million and $22 million.

---

(4) *See* Prospectus, Exhibit A to the Plutzik Declaration, at page 11.

(5) *See* Prospectus at 86,113 and 268; Prospectus Supplement (hereinafter cited as "Supplement"), at 25, 60, 84, 105, 127, 151, 175, 201. Relevant excerpts from the Supplement are attached collectively as Exhibit B to the Plutzik Declaration.

However, the General Partners made no effort whatsoever to determine the value of GC. (Had they done so, they would have had to conclude that the value of GC is far less than $18 million.) Rather, the General Partners allocated the REIT stock between the limited partners and the GC shareholders solely by comparing the cash flow of GC with the aggregate cash flow of the Partnerships.

As the Reilly Declaration convincingly demonstrates, the General Partners' methodology of allocating the stock by comparing cash flows is improper and results in the allocation of an excessive amount of stock to the owners of GC—*i.e.*, defendant Batinovich and others. Mr. Reilly, a highly experienced and qualified expert who is a co-author of the definitive treatise on the subject of business valuation,[6] has analyzed the Rollup Transaction and, in particular, the allocation of stock between the Partnerships and the shareholders of GC. He has concluded that the percentage of stock which has been allocated to the shareholders of GC has been unfairly inflated by a factor of *at least* 40% (relative to the Partnerships), and possibly substantially more. Reilly Declaration, ¶13.

The General Partners' allocation methodology violates fundamental valuation principles and produces an unfair result in several distinct respects.

(i) Failure to Allocate in Accordance with the Relative Value of the Assets Contributed to the REIT

Instead of measuring the cash flow of the Allocation Partnerships against the cash flow of GC to determine how to divide the REIT stock, the General Partners should have allocated the stock in accordance with the ratio between the *fair value* of the Allocation Partnership assets and the *fair value* of GC. Reilly Declaration, ¶¶8,11. A comparison of cash flows,

(6) Shannon P. Pratt, Robert F. Reilly and Robert Schweihs, *Valuing a Business* (3d Edition, 1996).

even if properly conducted, is no substitute for a comparison of *values*.

Indeed, the cash flow of one group of business entities, such as the Partnerships, to the cash flow of another business entity engaged in an entirely different business, such as GC, cannot yield a fair allocation because the two figures are simply not comparable—they are apples and oranges. This is so because, for purposes of estimating value, one must consider not only cash flow but also *the risk that the cash flow will be achieved*. The cash flow must then be discounted by that risk to arrive at a fair estimation or comparison of value. Reilly Declaration, ¶¶8-12.

It is a fundamental precept of valuation that risk varies depending on the particular business involved and, especially, on the line of commerce in which the business operates. Reilly Declaration, ¶8. Far greater risk is associated with the income stream of a service company engaged in property management than with the rental income generated by commercial real property. Indeed, the discount rate which must be applied to the cash flow generated by a service company like GC is *at least double* the discount rate applicable to the cash flow earned by the Partnerships' real estate properties. Reilly Declaration, ¶12.

Therefore, even if the cash flow figures on which the General Partners based the stock allocation were otherwise valid (which, as we shall see, they were not), GC's cash flow would nevertheless have to be discounted substantially relative to the cash flow generated by the Partnerships to produce a fair comparison. *Id.* However, in allocating the stock between the limited partners and themselves, the General Partners simply compared cash flow figures and made no allowances at all for risk. As a result, the the General Partners allocated to themselves and their affiliates a far greater percentage of the REIT's stock than they deserved.

(ii) Inappropriate and inconsistent Calculation of Cash Flow

Moreover, for purposes of comparison with the Partnerships' cash flow, the General Partners calculated GC's cash flow in an inappropriate, inconsistent and unfair fashion. Reilly Declaration, ¶¶9- 10

The allocation to the GC shareholders of 29% of the stock which the limited partners will receive was first proposed by the General Partners in Pre-Effective Amendment No. 2 to the Rollup's Registration Statement, which was filed with the Securities and Exchange Commission on January 4, 1995. The cash flow figure used for GC in that allocation was $1.897 million, which was based on budgeted (*i.e., predicted*) results for GC for a single fiscal year—fiscal year ended June 30, 1995.[7] The General Partners continue to base their allocation of the REIT stock on GC's *predicted* fiscal 1995 cash flow. This is improper for two reasons.

First, regardless of whether one uses budgeted numbers or historical financial data in conducting a valuation analysis, that data must be normalized, either by adjusting to exclude extraordinary items or by averaging several years of results, or both. Historical or projected financial data used in a valuation analysis should present a fair picture of the company's actual or projected results, and should not reflect aberrational results of operations for particular years which may not be representative of past or future performance in other years. Reilly Declaration, ¶9. Where the financial results of a company differ significantly from year to year, to use a single year's figure without normalizing it and without considering results from other years produces anomalous and unfair results.

Here, GC's financial results varied widely from year to year during the five years immediately prior to the issuance of

---

(7) Pre-Effective Amendment No. 2, at page 94. *See* Exhibit C to the Declaration of Alan R. Plutzik, filed herewith.

the Prospectus.[8] Yet, the GC cash flow figures which formed the basis for the allocation in Pre-Effective Amendment No. 2 were nevertheless based on *a single year's* projected results, and there is no indication that those results were appropriately normalized.

Second, the General Partners have continued to rely on budgeted or projected fiscal 1995 cash flow figures in allocating the REIT stock long after those figures have been superseded and undermined by *actual* fiscal 1995 results. As noted above, the allocation of the stock based on budgeted fiscal 1995 cash flow was first proposed by the General Partners in a document filed in January, 1995. By the time the Prospectus became effective in late October, 1995, GC's 1995 fiscal year had concluded and the *actual* results for that fiscal year were available. Indeed, actual financial results for fiscal 1995 are included in materials mailed to the limited partners to solicit their consent to the Rollup. Yet, the General Partners continue to base their stock allocation on the *previously projected* fiscal 1995 results rather than making use of the actual reported fiscal 1995 numbers that superseded them.

The General Partners' motive in ignoring the actual 1995 numbers becomes clearer when those numbers are scrutinized. While definitive cash flow figures for 1995 cannot be determined from the data which the General Partners have disclosed, it appears that, when normalized to remove extraordinary items, GC's *actual* fiscal 1995 results were significantly less favorable than 1994.[9] The Prospectus's failure

---

(8) GC's reported financial results for the years 1991-1995 are found at page 275 of the Prospectus.

(9) GC reported net income of $718,000 in fiscal 1995, down substantially from the $3.1 million in net income reported the previous year. Supplement, at page 7. *See* Exhibit B to the Plutzik Declaration. Moreover, at least $1.7 million of GC's revenues for the 1995 fiscal year were attributable to extraordinary income from the so-called "Rancon Partnerships". If that revenue and associated costs were excluded, it appears that GC's profits for the year would have been reduced by at least $400,000. *Id.*

to make use of, or even discuss, actual fiscal 1995 results raises serious questions about the integrity of the allocation process.

(iii) The General Partners Improperly Relied on "Adjusted" Cash Flow From A Year Whose Were Inflated By Extraordinary Income

Notwithstanding the fact that the allocation of stock between the limited partners and the GC shareholders is based on projected *fiscal 1995* cash flows, the Prospectus repeatedly invokes "adjusted" historical financial results from GC's *1994* fiscal year, which ended June 30, 1994. The Prospectus argues that because the 1994 cash flow figures would justify an even higher allocation of stock to GC's owners than the 29% figure actually awarded, the allocation actually made is reasonable. However, the General Partners' reliance on GC's "adjusted" 1994 cash flow figures does not mitigate the unfairness of the transaction.[10] The evidence shows, and Mr. Reilly has concluded, that reliance on GC's fiscal 1994 "adjusted" cash flow to allocate the stock in the REIT would be inappropriate. Reilly Declaration, ¶¶9-10.

Fiscal 1994 was an aberrational year for GC which is not in any way representative of that company's past performance. In that fiscal year, GC reported the highest revenues, net income and book value of any of the past five years. Prospectus at 275. Indeed, GC's 1994 results exceeded those for other recent years by a very wide margin. *Id.*

Even more importantly, fiscal 1994 results are not indicative of GC's *future* performance. GC's results for fiscal 1995 were substantially worse than the 1994 results—the Company's revenues, profits and book value all plummeted. *Id.* Indeed, the notes to GC's financial statements indicate that GC

---

(10) Indeed, as we demonstrate below, the Prospectus's focus on GC's fiscal 1994 adjusted cash flow figures as a justification for the huge quantity of stock being allocated to the GC shareholders is highly misleading. See discussion at pages 17-18, below.

experienced a "decrease in management activities" in fiscal 1995. Supplement at 1 (see Exhibit B to the Plutzik Declaration). Furthermore, there is good reason to believe that unless the Rollup goes forward, GC's performance will decline even more in the future because many of the Partnerships on which GC has been depending for fee income will be reaching their expiration date and will be dissolving and liquidating their assets.

Thus, two of the largest and most important Partnerships on which GC has been relying for fee income—All Suites and Outlook IV—are at the end of their term and, absent the Rollup, would liquidate themselves. Prospectus at 92. These two Partnerships alone appear to have generated some $2.5 million in management fees for GC in fiscal 1994—some 15% of GC's reported revenues. Supplement at pages 152-158, 202-206. If the Rollup does not go forward, All Suites and Outlook IV will dissolve and these fees will vanish. Indeed, most of the Partnerships are at or near their projected expiration date and will pass out of existence unless the Rollup is approved. Prospectus at 41. As these Partnerships are phased out, GC's revenues, cash flow and net income will be significantly reduced.

Moreover, the General Partners have chosen to employ a far different methodology in computing GC's fiscal 1994 cash flow than they used in computing the cash flow for the Partnerships.[11]Accordingly, the figures for GC's cash flow and for those of the Partnerships are not comparable to each other.

In sum, reliance on the "adjusted" historical cash flow of GC for the aberrational and unrepresentative fiscal year 1994, without considering future earning capacity or actual results from other years, is improper and does not mitigate the fairness of the transaction to the limited partners.

---

(11) *See* Prospectus at 102-103

(iv) Failure to Consider Determinants Of Value Other Than Cash Flow

Furthermore, in allocating stock in the REIT between the Allocation Partnerships and themselves, the General Partners relied solely on a cash flow comparison, and paid no attention to any other relevant factors, such as market comparables or asset values. This dereliction is particularly significant because the analysis failed to reflect the fact that the Partnerships owned real estate which had a substantial market value, while GC owned few, if any, significant assets. Had such considerations been taken into account, the percentage of stock accorded to the shareholders of GC would have had to be substantially reduced.

A balance sheet comparison illustrates this point dramatically. The aggregate book value of the Partnerships, as reported in the Prospectus, is $76.6 million.[12] The book value of the GC assets being contributed to the REIT, on the other hand, is a negative $6.1 million. Prospectus at 5. In light of this disparity, it was fundamentally unfair for the General Partners to give the shareholders of GC 29% of the stock they allocated to the limited partners. See Reilly Declaration, ¶13.

2. The Rollup is Also Unfair Because It Deprives the Limited Partners of Valuable Rights and Extends Substantial Benefits To The General Partners At The Limited Partners' Expense

The Rollup is also unfair in that it deprives the limited partners of valuable rights for inadequate consideration and

---

(12) *See* the financial statements of the Partnerships, at pages 277, 279, 281, 283, 285, 287, 291 of the Prospectus. Other measurements of the value of the assets owned by the Partnerships yield remarkably similar valuations. For example, the Prospectus represents that the Partnerships have a "Portfolio value" of $70.7 million (*Id.* at 113), and a "net asset value", exclusive of the costs of the Rollup, of $68.7 million. *Id.* at 268. In addition, the Prospectus represents that if the assets of the Partnerships were immediately liquidated, they would fetch $65.5 million in the marketplace. *Id.* at 15, 86.

unfairly provides benefits to the General Partners. The following points are relevant in this connection:

a. The Rollup Entrenches Management And Prevents The Partnerships From Liquidating Or Adopting Other Strategies to Maximize Returns to The Limited Partners

The Rollup entrenches management by incorporating the property management company, GC, in the REIT, and by giving the General Partners and their affiliates substantial up-front stock in the entity. In so doing, it forecloses the possibility that the Partnerships could either (a) continue to operate as they have historically done; (b) replace management and continue to operate; or (c) liquidate and distribute their assets to the limited partners. This loss of options is highly significant.

The performance of rollups generally has been "dismal". The higher liquidity attributable to rollups "comes at an extremely high cost to the limited partners."[13] Indeed, a recent study has revealed that the estimated loss of value stemming from a typical rollup of a real estate limited partnership is 30% of the investors' original investment.[14] Moreover, in this case, there are no significant benefits to the limited partners to counterbalance the many negatives. Indeed, the Prospectus itself acknowledges that the limited partners would do at least as well financially if the Partnerships were entirely liquidated as they would do by participating in the Rollup, even under the most optimistic scenario for the performance of the REIT. Prospectus at 15. Under these circumstances, it is a breach of fiduciary duty for the General Partners to recommend that the limited partners approve and participate in the Rollup Transaction.

---

(13) Geschke, "Regulating Rollups: General Partners' Fiduciary Obligations in Light of the Limited Partnership Rollup Reform Act of 1993", 47 Stanford L. Rev. 85, 90 (Nov., 1994).

(14) *Id.*, 47 Stanford L. Rev. at 94.

The General Partners' motives in creating and recommending the Rollup are highly suspect. If the Rollup goes forward, they will receive publicly traded stock worth an estimated $18-$23 million. Prospectus at 47-48. However, if the Partnerships were to liquidate, the General Partners would receive less than $3 million in cash, and would be saddled with continued ownership of GC as its revenues and profits declined. *Id.*

b. Elimination of $63 Million of Accumulated Rights to Preferred Annual Returns

Under the existing partnership agreements, the limited partners are entitled to approximately $63 million in aggregate accumulated preferred annual returns from the Partnerships. This means that the limited partners would be entitled to receive certain minimum returns before subordinated returns flow to the General Partners. Prospectus at 5, 47. The Rollup would extinguish these preferred returns, thereby benefiting the General Partners. The limited partners will receive no consideration for the surrender of these valuable rights.

c. Unfair Imposition of Massive Transaction Costs On The Limited Partners

The transaction costs of the Rollup will aggregate over $4 million—an expense which would not be incurred but for the transaction. Prospectus at In the event that the Rollup is consummated, these enormous and unproductive transactional costs will be paid by the REIT. Prospectus at 6. Thus, the limited partners, as the owners of 78% of the REIT's stock, will end up shouldering the lion's share of this cost—an immediate dilution of over 5% in the value of their investment. *Id.* The imposition of these expenses on the limited partners without any corresponding benefit is unfair and improper.

d. Elimination of Debts, Personal Guarantees And Liability and Other Benefits For The General Partners and Their Affiliates

In addition to giving the General Partners a controlling interest in the REIT and entrenching them in their positions, the Rollup would also extend to the General Partners and their affiliates a cornucopia of ancillary, but extremely valuable benefits at the expense of the limited partners. First, the Rollup would eliminate at least $4.3 million of liability owed by the General Partners as a result of Partnership debts which they personally guaranteed. Prospectus at 17. Second, it would extinguish personal liability of Robert and Andrew Batinovich on $14.3 million of GC's debt for which they have given personal guarantees. *Id.* Third, the transaction has been structured so as to permit the General Partners to obtain tax benefits of approximately $19 million. *Id.* at 17. These benefits will not be shared by the limited partners, many of whom will incur a tax *detriment* as a result of the transaction. Prospectus at 6-7.

Finally, GPA, Ltd., a partnership controlled by the General Partners and their affiliates, has been given a special deal more favorable than that of any of the other Partnerships. Under that arrangement, GPA receives a share of an Operating Partnership controlled by the REIT instead of REIT stock, together with a redemption right, thus enabling GPA to avoid exposure to a potential decline in the REIT's stock after the Rollup. Moreover, that share exceeds the relative value of the assets which GPA will contribute to the REIT. Prospectus at 149-50. This arrangement is unfair to the partners in the other Partnerships.

B. The Prospectus is Materially False and Misleading

Apart from the fact that the Rollup is substantively unfair to the limited partners, the Prospectus is materially false and misleading in numerous respects. And while this would be improper in any commercial setting, it is especially so where—

as here—the Prospectus has been prepared by the limited partners' own *fiduciaries*![15]

The mispresentations and/or omissions of material fact in the Prospectus include, but are not limited to, the following:

(a) The Prospectus contains numerous representations to the effect that the Rollup represents the best opportunity for the limited partners to obtain distributions and maximize investment value. For example, in a section of the Prospectus entitled "SUMMARY," under the heading, "Benefits of, and Background and Reasons for, the Consolidation," the Prospectus represents:

> Given the prevailing market conditions, the General Partners believe the Consolidation is the most attractive alternative for providing Investors with liquidity and the possibility of increased distributions and investment value as compared to a liquidation of the Partnerships' assets. Accordingly, the General Partners believe the Consolidation is the best means of most closely meeting the Partnerships' original investment objectives.

Prospectus at 8. Similarly, in the "SUMMARY" section of the Prospectus, under the heading, "Recommendation of the General Partners," the Prospectus represents:

> The General Partners believe the Consolidation is the most attractive alternative for providing Investors with liquidity and the possibility of increased distributions and investment value as compared to a liquidation of the Partnerships' assets. Accordingly, the General Partners believe the Consolidation is the best means of meeting the Partnerships' original investment objectives.

---

(15) It is hornbook law that general partners stand in a fiduciary relationship with their limited partners. *Sherman v. Lloyd*, 181 Cal. App. 693, 698-99 (1986).

Prospectus at 8. These representations are materially false and misleading, in that, inter alia, the Rollup is most likely to *decrease*—not increase—distributions to the limited partners by virtue of, among other things, (i) the fact that the Rollup would eliminate the limited partners' rights to preferred returns (relative to the General Partners), (ii) the limited partners' ownership interests will be substantially diluted by virtue of the excessive and disproportionate allocation of shares to the GC, (iii) the REIT will be saddled with GC's enormous debt load and massive *negative* book value; and (iv) the limited partners will in effect bear some $4 million of transaction costs in connection with the Rollup, which monies which otherwise would be available to fund distributions (as for operating purposes). In addition, the Rollup is most likely to *decrease*—not increase—the value of the limited partners' holdings by virtue of, among other things, (i) the perpetuation of management by the General Partners (under whom only *one* of the Partnerships has returned the amount of the original invested capital—let alone any return thereon), (ii) the dilution of the limited partners' ownership interests by virtue of the excessive and disproportionate allocation of shares of common stock to the General Partners, (iii) the elimination of the limited partners' rights to preferred returns, (iv) the effective elimination of the limited partners' right to obtain a return of capital through liquidation of the Partnerships' assets during the time originally contemplated by the partnership agreements, and (v) the substantial transaction costs of the Rollup.

(b) The Prospectus contains numerous representations to the effect that the General Partners believe the Rollup is fair to the limited partners. For example, in the "SUMMARY" section of the Prospectus, under the heading "Fairness," the Prospectus represents, "The General Partners reasonably believe the terms of the Consolidation are fair as a whole, and to the Investors in each of the

Partnerships, regardless of which combination of Partnerships is included in the Consolidation." Prospectus at 8. Similarly, in a section of the Prospectus entitled, "FAIRNESS," under the heading, "General Partners' Belief as to Fairness," the Prospectus represents, "The General Partners reasonably believe that the terms of the Consolidation are fair when considered as a whole, and to the Investors in each of the Partnerships, regardless of which of the Partnerships are included in the Consolidation, or whether an Investor receives Shares or Notes, assuming the Minimum Participation requirement is met." Prospectus at 74. These representations are materially false and misleading in that, *inter alia*, (i) the Rollup is grossly unfair to the limited partners for the reasons set forth above, (ii) the General Partners have no reasonable basis to believe, and do not in good faith believe, that the Rollup is fair to the limited partners, and (iii) the Rollup benefits the General Partners at the expense of the limited partners.

(c) The Prospectus contains recommendations by the General Partners that the limited partners approve the Rollup. For example, in the "SUMMARY" section of the Prospectus, under the heading, "Recommendation of the General Partners," the Prospectus represents, "The General Partners have approved the Consolidation and believe the Consolidation is fair as to each Partnership, any combination of Partnerships, and as a whole. The General Partners strongly recommend that the Investors in each Partnership vote "YES" in favor of the Consolidation." Prospectus at 8. These representations are materially false and misleading in that, *inter alia*, (i) the Rollup is grossly unfair to the limited partners for the reasons set forth above, (ii) the General Partners have no reasonable basis to believe, and do not in good faith believe, that the Rollup is fair to the limited partners, and (iii) the Rollup benefits the General Partners at the expense of the limited partners.

(d) The Prospectus contains numerous representations to the effect that the General Partners believe that the Rollup is superior to other alternative available to the limited partners, including continued management in present form. For example, in the "SUMMARY' section of the Prospectus, under the heading, "Comparison of Alternative Consideration," the Prospectus represents:

> The General Partners believe that the comparison of the values that might be realized from various alternatives when considered together with the anticipated effect of the Consolidation on distributions and with all the other differences between continued ownership of Units as compared with the receipt of Shares or Notes, supports the General Partners' conclusion that the consolidation is fair to Investors.

Prospectus at 15. Also, in a section of the Prospectus entitled, "THE CONSOLIDATION AND RELATED TRANSACTIONS," under the heading, "Approval and Recommendations of the General Partners," the Prospectus represents, "The General Partners have approved the Consolidation. The General Partners believe that an investment in the Company through ownership of common stock will provide greater overall benefits to Investors than the benefits derived from an investment in an individual Partnership or from any of the alternatives to the Consolidation considered by the General Partners." Prospectus at 55. These representations are materially false and misleading, in that, *inter alia*, (i) the Rollup is more likely to decrease—not increase—distributions to the limited partners, as discussed above, (ii) the Rollup is more likely to decrease—not increase—the value of the limited partners' holding, as discussed above, and (iii) the General Partners have no reasonable basis to believe, and do not in good faith believe, that the Rollup is preferable to other alternatives available to the limited partners.

(e) The Prospectus contains numerous representations to the effect that the General Partners believe that the allocation of shares as between the Limited Partners, on the one hand, and the Management Companies, on the other, is proper. For example in a section of the Prospectus entitled, "ALLOCATION OF SHARES AND NOTES," under the heading, "Level I Allocation—Allocation Between GC and the Allocation Partnerships as a Group," the Prospectus represents:

> The Company and the General Partners believe the public equity markets will value the Company's Shares based primarily on an evaluation of the Company as an ongoing business, with estimated pro forma adjusted funds from operations and resulting cash distributions being the critical factors in this valuation. Therefore, the Company and the General Partners have determined that it is appropriate and fair to allocate shares the Shares of the Company between the Allocation Partnerships and GC based on their relative contributions to the anticipated operating cash flow of the Company.

Prospectus at 10 1. These representations were materially false and misleading in that, *inter alia*, (i) the methodology of allocating shares in this manner as improper and incomplete insofar as it focused on "cash flow" rather than "value," (ii) the manner in which defendants' purported to apply a comparison based on cash flow was improper and biased in favor of the shareholders of GC, and (iii) under proper valuation techniques, the value of GC relative to the Partnerships was substantially less than that reflected in the Level I allocation.

(f) The Prospectus represents that the allocation of shares as between the shareholders of GC and the Partnerships affords the limited partners a substantial discount because, while the "cash flow" of GC purportedly has increased since the original valuation, the allocation of

shares to GC was not being changed. For example, in a section of the Prospectus entitled, "ALLOCATION OF SHARES AND NOTES," under the heading, "Level I Allocation—Between GC and the Allocation Partnerships as a Group," the Prospectus represents:

> **Allocation of Shares.** The General Partners originally made the allocation of Shares as of September 1, 1994. At that time, operating cash flow was determined to be $7,477,756 for the Partnerships as a group, and $1,897,604 for GC, for a total of $9,375,360. GC's cash flow accounted for 20.24% of total cash flow, and the cash flow of the Partnerships as a group accounted for 79.76% of total cash flow. Accordingly, of the Company's total Common Stock, the Partnerships as a group were allocated 79.76% (5,480,800 Shares), and GC was allocated 20.24% (1,390,815 Shares).
>
> * * * *
>
> As a result of the Rancon Transaction, GC's cash flow has increased by approximately 55%. However, the General Partners have elected to maintain the previous percentage allocation of Shares in the Level I Allocation. For allocation purposes, this treatment is equivalent to a substantial discount of the cash flow contributed by GC to the Company in connection with the Consolidation.

Prospectus at 105. These representations are materially false and misleading in that, *inter alia*, (i) the value of GC has not materially improved since the original allocation and (ii) to the extent that the value of GC has changed since the original allocation, it has worsened.

(g) The Prospectus contains numerous representations that rollups involving real estate limited partnerships traded at or above their "asset value per share." For example, in a section entitled "FAIRNESS," under the

heading "Valuation of Shares," the Prospectus made representations concerning the trading history of certain "recent" Rollups. Prospectus at 88. These representations are materially false and misleading in that, *inter alia, in many* (if not most) rollup situations, the average value of the investment has declined substantially.

(h) The Prospectus contains numerous representations concerning the purported advantages of the Rollup. For example, in the section of the Prospectus entitled "BENEFITS OF, AND BACKGROUND AND REASONS FOR, THE CONSOLIDATION," under the heading "Benefits of, and Reasons for, the Consolidation," the Prospectus discusses supposed advantages of the Rollup, including, but not limited to, increased distributions, liquidity and diversification of assets. Prospectus at 51-53. However, these representations are materially false and misleading in that, *inter alia*, (i) the Rollup is more likely to decrease—not increase—distributions to the limited partners, as discussed above, (ii) the common stock of the REIT is likely to trade well below the comparative value of the limited partners' current ownership interests such that any "liquidity" will be realized only through a substantial loss in value, and (iii) given that the assets held by the Partnerships are similar, the Rollup will not result in any meaningful diversification of assets.

III. APPLICABLE LEGAL STANDARDS

The basic prerequisite to approval of a class action settlement is a judicial determination that the settlement is "fair, reasonable, and adequate." *See Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).[16] In making this determination, the Court "acts as a fiduciary who must serve as a guardian of the rights of absent class members . . .. The Court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate." *Id. See also I.U.E. v. Unisys Corp.*, 858 F.Supp. 1243, 1264 (E.D.N.Y. 1994)

The Court's duty to scrutinize a settlement is heightened where, as here, a determination on class certification was coincident with the negotiation of a settlement. *Mars Steel v. Illinois National Bank & Trust Co. of Chicago*, 834 F.2d 677, 680-681 (7th Cir. 1987); *Weinberger v. Kendric*, 698 F.2d 61, 73 2d Cir. 1982) *cert denied*, 464 U.S. 818 (1983). As stated by the Second Circuit in *Weinberger,*

> Although we thus refuse to adopt a per se rule prohibiting approval when a class action settlement has been reached by means of settlement classes certified after the settlement, with notice simultaneous with that of the settlement, we emphasize that we are permitting, not requiring, use of this procedure, and also underscore that,...district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care. This is necessary in order to meet the concerns, noted in the *Manual*, regarding the possibilities of collusion or of undue pressure by the defendants on wouldbe class representatives. Accordingly, we will demand a clearer showing of a settlement's fairness, reasonableness and

---

(16) California courts often look to Federal Rule of Civil Procedure 23 (and the case law thereunder) in analyzing class certification issues. *E.g., Schneider v. Vennard*, 183 Cal.App.3d 1340, 1347 (1986).

adequacy and the propriety of the negotiations leading to it in such cases than where a class has been certified and class representatives have been recognized at an earlier date. *Id.*

In determining whether a settlement is fair, reasonable, and adequate, several factors are relevant, including (1) the complexity, expense, and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-463 (2d Cir. 1974); *In re Oracle Securities Litigation*, 829 F.Supp. 1176, 1179 (N.D.Cal. 1993).

Of these, "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *City of Detroit, supra* at 455 (quoting *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U.S. 871, (1971)). *See also In re Traffic Executive Ass'n Eastern Railroads*, 627 F.2d 631, 633 (2d Cir. 1980); *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980). Consistent with that principle, the courts have refused to approve settlements where the consideration provided by the settlement was not adequate. *In re Traffic Executive Ass'n—Eastern Railroads*, 627 F.2d at 63 1; *Buchet v. ITT Consumer Financial Corp.*, 845 F.Supp. 684 (D.Minn. 1994); *Reynolds v. King*, 790 F.Supp. 1101 (M.D.Ala. 1990).

Also, the courts have repeatedly expressed the view that class counsel should not sacrifice the interests of the class for personal gain. *Ficalora v. Lockheed California Co.*, 751 F.2d 995, 996-997 (9th Cir. 1985); *Armstrong*, 616 F.2d at 313; *In re*

General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1129-1131 (7th Cir. *cert denied* 444 U.S. 870 (1979)). Thus, the courts have refused to approve settlements in cases where it appeared that class counsel had compromised the rights of the class in order to benefit themselves.

As will be shown, under these standards, the proposed settlement is this action is not "fair, reasonable, and adequate." Therefore, it must not be approved.

VI. THE SETTLEMENT IS NOT FAIR, REASONABLE AND ADEQUATE

A. The Settlement Confers No Meaningful Benefit on the Class

As noted above, the most important factor in assessing the propriety of a proposed settlement is the strength of plaintiffs' claims balanced against the consideration obtained in the settlement. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 455.[17] As the foregoing discussion shows, plaintiffs claims are extremely strong on the merits. Nonetheless, the proposed settlement of those claims—including all claims for money damages which the class members may have against defendants (or any other persons!) under the federal securities laws and the California Corporations Code—confers no *meaningful benefit* on the members of the class. Therefore, it is not fair, reasonable or adequate.

First and foremost, under the terms of the proposed settlement, the class will not receive *one dime* of cash, stock or other economic consideration. The proposed settlement does not create a settlement fund, nor have the basic terms of the Rollup, i.e., the allocation of shares as between the limited

---

(17) This consideration essentially embraces several of the constituent factors articulated in *City of Detroit v. Grinnell Corp.*, *i.e.*, the risk of establishing liability (factor (5)), the risk of establishing damages (factor (6)), the range of the reasonableness of the settlement in light of the best possible recovery (factor (8), and the range of the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation (factor (9)).

partners (on the one hand) and the General Partners (on the other) been changed. Thus, the limited partners are not receiving any more economic consideration—whether in the form of cash, securities or otherwise—than they would absent the settlement. Yet all claims for damages which the some 13,000 class members may have arising out of this $96 million transaction—including claims which the class members may have under (1) Sections 11 and 12(2) of the Securities Act of 1993 (15 U.S.C. §§77k; 771), (2) Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), (3) California Corporations Code sections 25400 *et seq.*, and (4) California common law (including breach of fiduciary duty, fraud, and negligent misrepresentation) will be permanently released, discharged, and barred. *See* Settlement Agreement at ¶¶2.20; 7.7-7.9. Even worse, the scope of the claims released, discharged, and barred runs not only to the named defendants (and their affiliates), but to *any other person* (such as appraisers, auditors, attorneys and others), even though such parties are not before the Court and have not contributed *anything* to this settlement. Given the total absence of any economic consideration to the class—and the permanent, total and absolute bar on the class members' ability to sue *anyone* in connection with this transaction—the settlement must be rejected.

Furthermore, the two types of "benefits" which the settlement does purport to confer on the class, i.e., "curative disclosures" and restrictions on stock sales and options (see Settlement Agreement at 15), are totally meaningless. For example, the "curative disclosures" amount to a handful of sentences in a document that it approximately *five hundred pages* long! See Settlement Agreement at ¶5.1.1. Indeed, of these new sentences, only three of them appear in the first *three hundred* pages of the Prospectus. This alone demonstrates that the "curative disclosures"—buried, as they are, in an document of overwhelming length and complexity—are totally inconsequential.

Moreover, these "disclosures" add nothing of substance to the content of the Prospectus. While they purport to be "risk factors" of one sort or another, they do little more than duplicate—substance and effect—concepts expressed elsewhere in the Prospectus. Thus, their *quality* is as insignificant as their *quantity*.

That these "disclosures" add nothing of real value to the Prospectus is reflected in the fact that defendants were willing to include these matters in the Prospectus even though the settlement has not been finally approved. If these "disclosures" were truly meaningful, i.e., reflected previously undisclosed information truly *useful* to the limited partners and truly *adverse* to the defendants' position on this transaction, one would think that the defendants would have wanted final approval *before* sending the Prospectus to the limited partners. That they did not simply confirms that the disclosures add nothing to the Prospectus.

The other "benefits" conferred by the settlement are equally insignificant. First, the purported "agreement" on the part of defendant Robert Batinovich and related persons not to sell any of their shares for two years after the rollup provides no benefit to the limited partners. Furthermore, even prior to the settlement, defendant Batinovich and others had *already agreed to sell their shares for a period of one year*! *See* Pre-Effective Amendment No. 2 at 264. Thus, any suggestion that plaintiff s counsel themselves created this restriction is false. Finally, this "restriction" is not absolute; rather, the persons subject to this restriction may sell shares if the *REIT consents*. *Id.*; Pre-Effective Amendment No. 4 at 354.[18] Since the REIT will be controlled by none other than Robert Batinovch, the "restriction" on his (and his affiliates') ability to sell shares is, in reality, no restriction at all.

---

(18) Neither the prior agreement nor the conditional nature of the restriction is reflected in the Settlement Agreement, the Order Certifying Settlement Class, Approving Notice of Proposed Settlement, and Setting Settlement Hearing, or (most important) the Notice to the Class.

Similarly, the fact that the REIT (1) is restricted from issuing stock options' to employees for ninety (90) days after the roll-up and (2) must use an exercise price of $15.00 for one year is immaterial. Given that Batinovich and his affiliated owners are already receiving over 1.3 million shares of stock (and may be entitled to earn even more through the GPA Redemption Stock), the provision that they cannot earn even more for ninety (90) days is totally insignificant. Also, the restriction on the exercise price is easily avoided since the REIT need wait only one year before granting options. Thus, these "restrictions" confer no real benefit on the class. Plaintiff's counsel may argue that their efforts have conferred a benefit on the class in that defendants have not taken advantage of "improved" cash flow on the part of GC (relative to the Partnerships) to re-allocate shares to the limited partners.[19] This argument has no merit.—

First, defendants' reliance on "cash flow" is improper. As discussed above, a correct allocation of shares would be based on "fair market value," which (at least in the case of GQ defendants totally fail to address. Therefore, while increases or decreases in "cash flow," properly defined, *might* have some bearing on "fair market value," cash flow does not *equal* "fair market value." Accordingly, defendants' reliance on

---

(19) As described above, defendants originally allocated shares between the shareholders of GC, on one hand, and the Partnerships, on the other, based on GC's *budgeted* results for the fiscal year ended June 30, 1995: pursuant to this allocation, the Partnerships were to receive some 5,006,000 shares, and Glenborough was to receive some 1,390,815 shares. See Pre-Effective Amendment No. 2 at 93-94. Thus, of the shares allocated to these entities, the Partnerships were to receive some 78%, and the shareholders of GC were to receive some 22%.

In the final Prospectus, the General Partners contend that the "cash flow" of GC (relative to the Partnerships) is actually far better than that reflected in the original allocation. Prospectus at 11; 105. In this regard, defendnants rely on actual results for the fiscal year ended June 3 0, 1994, as adjusted in numerous respects. Defendants then assert that, because they are not ulitizing the "improved" cash flow figures, the limited partners are, in effect, obtaining a substantial discount.

"improved" cash flow—to the exclusion of "fair market value"—is improper.[20]

Furthermore, to the extent the value of GC has changed in recent months, it has declined! For example, GC's reported pre-tax income for fiscal 1995 was only *one-third* of that reported for 1994. Prospectus at 265. Similarly, net income for fiscal 1995 was less than *one-fourth* of that reported for fiscal 1994. *Id.* Indeed, it appears that, but for the inclusion of the income from the Rancon Partnerships transaction, GC's reported pre-tax income and net income would have been even lower. *See* Supplement at 11.

In addition, the book value of GC declined substantially from 1994 to 1995. As of June 1994, GC's net book value was only $31,000 (itself a remarkably low figure for a concern supposedly worth millions of dollars), but as of June 30, 1995, it was even lower—the book value a *negative* $4.5 million. Prospectus at 275.[21] This, too, provides clear indication that, to the extent the fair market value of GC changed between 1994 and 1995, it *worsened*.

Moreover, according to one of the several measures of cash flow utilized by defendants, GC's cash flow in 1995 was substantially lower than 1994. Indeed, according to this "measure" (*i.e.*, earnings before taxes, depreciation, and amortization ("EBTDA")), cash flow for 1995 was only 60% of what it had been in 1994. Prospectus at 265.

---

(20) Here, the time frame during which the value of GC is said to have changed so radically is a few months. However, there is no reason to believe that GC's "fair market value" changed radically between during such a brief time frame, and defendants have failed to identify any factor which would have caused such a radical change. To be sure, GC acquired certain assets relating to the Rancon Partnerships in December, 1994. However, those assets presumably were acquired in an arms-length commercial transaction, *i.e.*, that GC had to pay value reasonably equivalent to the value which it received.

(21) The Prospectus states as well that the net book value of the assets of GC which are being contributed to the REIT is even lower—a *negative $6.1 million*! Prospectus at 5.

In addition, the entire approach of defendants is highly suspicious. As noted, at the time the original allocation was made, actual results for fiscal 1994 were available and could have been used: however, defendants elected to utilize budgeted results for 1995. Since the time of that allocation, the actual results for fiscal 1995 have become available, yet defendants *now* choose to go back to 1994. Why?

B. The Settlement was "Negotiated" at an Early Stage of the Litigation

Another relevant factor concerns the stage of the proceedings and the amount of discovery completed. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. This factor provides further reason for rejecting the settlement.

First, the settlement was negotiated at an extremely early stage of the litigation. The Complaint was filed on or about February 21, 1995, and the parties reached "substantial agreement" on a settlement by June, 1995—barely *four months* later. *See* Letter from Darryl P. Rains to Clerk, dated June 27, 1995. Moreover, it appears that there was no significant activity in the case (other than the settlement "negotiations"). Indeed, the only pleadings in the Court's file prior to the settlement are (1) the Complaint itself, (2) Case Management Conference Questionnaires and (3) assorted procedural stipulations and correspondence.

Also, despite the fact the Complaint alleges that the Consolidation was unfair to the limited partners of eight partnerships —indeed, "outrageously unfair" in its allocation of common stock to the General Partners (Complaint at 138)—plaintiff did not seek any form of temporary restraining order, preliminary injunction or similar relief. Thus, plaintiff made absolutely no effort to have the merits of the Complaint tested before this Court.

Finally, so far as class members Barnett, et al. are aware, the litigation was settled before any formal discovery by plaintiff. Plaintiff Blumberg apparently did not propound even

one interrogatory, document request, or request for admission, nor did he take any depositions. While he purported to obtain "relevant information" during the course of settlement negotiations, the material which he reviewed (which is not described) was that which defendants were willing to *voluntarily* produce. Thus, one can only presume that the information made available to plaintiff was highly sanitized.

In short, plaintiff Blumberg made no real effort to stop this unfair transaction, nor did he even attempt to obtain evidence which would have helped prove these claims. Rather, he chose to enter into a quick settlement. This weighs *against* approval.

C. The Settlement is "Tainted" by Virtue of the Provisions Concerning the Plaintiff Incentive Bonus and Plaintiff's Attorneys Fees

As set forth above, the courts have refused to approve settlements where there is evidence that class counsel has sacrificed the rights of the class members in favor of their own. *E.g., Ficalora v. Lockheed California Co.*, 751 F.2d at 996-997. Regrettably, that appears to be the case here.

Despite having obtained no meaningful benefit for the class, plaintiff's counsel negotiated the right to request up to $850,000 in attorneys' fees. Settlement Agreement at ¶9. Such a figure is especially remarkable given that counsel for the plaintiff devoted approximately 850 hours to the litigation. At forty (40) hours per week, this translates into approximately twenty-one (2 1) personweeks—little more than five (5) months of work. And since plaintiff's counsel are requesting an award of some $850,000, they are, in effect requesting an average hourly rate of approximately *$1,000*! Thus, plaintiff's counsel—not the class—are the true beneficiaries of this settlement. More important, the attorneys' fees are payable by the REIT. *Id.* The REIT, however, was formed only for purposes of the Rollup and will have no functional existence unless the Rollup is approved. Since the entity to pay counsel's fees will not even

exist (in any real sense) unless and until the Rollup is approved, plaintiff's counsel now have a *direct financial* interest in consummation of the Rollup.

Simply put, plaintiff's counsel are not only no longer *opposed* to the Rollup, they are not even impartial on the matter, *i.e.*, they have no interest in an unbiased and impartial submission of the matter to a vote by the limited partners. Rather, plaintiff's counsel now share with the General Partners the goal of seeing the Rollup approved. Therefore, their interests squarely conflict with those of the class members.

D. The Ability of Defendants to Withstand a Greater Judgment

Another relevant factor is the defendants' ability to withstand a greater judgment. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. Here, the primary relief sought is injunctive, *i.e.*, to prevent consummation of the roll-up. Were plaintiff to prevail on this claim, defendants would not even be exposed to a judgment for money damages (except as might be incidental to injunctive relief). Furthermore, there is no basis in the record to conclude that defendants would be unable to respond to a money judgment: indeed, so far as plaintiffs are aware, defendants have not even made that assertion. Therefore, the settlement cannot be justified on the grounds that defendants would be unable to respond to a money judgment.

E. The Reaction of the Class Members

Another factor is the reaction of the class members. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. Because class members Barnett, et al. are unaware of the sentiments of the other class members, they are unable to state whether this factor supports the settlement. However, even if one assumes that most class members are silent, that does not support an inference that they favor the settlement. *In re Oracle Securities Litigation*, 829 F.Supp. at 1179.

F. The Complexity, Expense and Likely Duration of the Litigation

A remaining factor is the complexity, expense, and likely duration of the litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463. This factor provides little, if any, support for the settlement.

First, were plaintiff Blumberg, class members Barnett, et al. or any other class member permitted to attempt to enjoin the Rollup—which, for the reasons set forth above, they should be permitted to do—such injunctive relief would end this litigation in days. Furthermore, regardless of whether injunctive relief is granted, this litigation is not unduly complex—and it need not be unduly expensive. There are few defendants and the issues are clearly identifiable. Accordingly, this factor does not militate in favor of settlement approval.

V. CONCLUSION

For the foregoing reasons, class members Barnett, Gold, Chaney, Mitchell and Buickerood respectfully request that the motion for final approval be denied in all respects.

Dated:
December 15, 1995

Respectfully submitted,

LAW OFFICES OF JOHN W. ALLURED
John W. Allured (S. B. #84770)
One Montgomery Street, Suite 1400
San Francisco, CA 94104
Telephone: (415) 837-2990

By: /s/ John W. Allured
John W. Allured

FARROW, BRAMSON, BASKIN & PLUTZIK
Alan R. Plutzik (S. B. #77785)
2125 Oak Grove Road, Suite 120
Walnut Creek, CA 94598
Telephone: (510) 945-0200

By: /s/ Alan R. Plutzik
Alan R. Plutzik

Attorneys for Class Members Doanld A. Barnett, Sheila Gold, Ronda Chaney, Lon Chaney, Jr., Robert Buickerood and Willam A. Mitchell